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IN THE

Supreme Court of the United States

October Term, 1980

No. 80- 79-585

~~GWEN DAVIS MITCHELL~~ and
DOUBLEDAY & COMPANY, INC.,
Petitioners,

v.

PAUL BINDRIM,
Respondent.

PETITION OF DOUBLEDAY & COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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v.

Paul Bindrim,
Respondent.

PETITION OF DOUBLEDAY & COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Doubleday & Company, Inc. ("Doubleday") petitions for a writ of certiorari to review the Order of the Supreme Court of California, entered in this case on July 12, 1979, which refused to hear an appeal from a decision of the California Court of Appeal.

Gwen Davis Mitchell ("Mrs. Mitchell") will also separately petition the Court for a writ of certiorari to review the same judgment.

Opinions Below

The Order of the Supreme Court of the State of California is set forth in Appendix A.[1] The decision of the California Court of Appeal, Second Appellate District, Division Four, per Justice Kingsley, with a concurring opinion by Justice Jefferson and dissent by Presiding Justice Files, was filed on April 18, 1979, is reported at 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, and is reprinted in Appendix B. Orders modifying the opinions therein and an order denying rehearing were filed on May 7, 1979 and are reprinted at B 33. The March 29, 1977 Order of the California Superior Court of Los Angeles County, reprinted in Appendix C, is not reported.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. In a defamation action where the standards of *New York Times* v. *Sullivan* apply, may a publisher be deemed to have acted with "actual malice" for believing the assurances of an established author that the work in question was one of fiction and that the characters therein were not identifiable if, at the time of publication of the

[1] References to the appendices are prefaced with the appendix letter followed by the page number.

hardcover edition and the licensing of the paperback, the publisher had no knowledge or reason to believe or suspect the contrary and when all lower courts have concluded that the publisher in fact had no knowledge of falsity and did not act with reckless disregard as to the truth or falsity of the work at the time of publication?

2. Upon receipt of a letter vaguely alleging the presence of unspecified libelous material and demanding suspension of any further distribution of a fictional work—and despite an experienced author's renewed guarantees of character non-identifiability in that work—must a publisher nonetheless disregard the author's disavowals and cause all further distribution of the work to be suspended pending completion of its own independent investigation of the matter?

3. May the publisher of a novel, upon receipt of a vague demand to suspend continued distribution of that already published work because of allegedly defamatory material contained therein, and in reliance upon (a) an experienced author's express assurances of character non-identifiability given both prior and subsequent to publication and (b) the author's contractual warranties as to the non-identifiability of the characters in the book, nonetheless be deemed to have "published" that fictional work with "actual malice" because it did not immediately act to prevent a licensee from distributing the paperback edition of the novel?

4. May the publisher of a novel, upon receipt of a vague demand to suspend continued distribution of that

already published work because of allegedly defamatory material contained therein, and in reliance upon (a) an experienced author's express assurances of character non-identifiability given both prior and subsequent to publication and (b) the author's contractual warranties as to the non-identifiability of the characters in the book, nonetheless be deemed to have acted in a highly unreasonable manner constituting such an extreme departure from the standards of investigation ordinarily adhered to by responsible publishers of fictional works that the publisher is guilty of having "published" the novel with "actual malice"?

5. May punitive damages in a libel action be awarded against a publisher in the absence of any evidence whatsoever of the publisher's common law malice or "ill will" toward the plaintiff and particularly in circumstances where it is undisputed that the publisher neither knew of nor even suspected the existence of the plaintiff at the time of its publication of the fictional work in dispute?

Constitutional Provisions and Statutes Involved

This case involves the First and Fourteenth Amendments to the United States Constitution and Section 48a of the California Civil Code, salient provisions of which are reprinted in Appendix D.

Statement of the Case

Introduction

This case involves the application of the "actual malice" libel standard to a work of fiction and presents an unparalleled and completely unprecedented departure from the protections this Court has so carefully drawn to insure the free expression of ideas under the First Amendment. Far from comporting with the standards enunciated in *New York Times Co.* v. *Sullivan,* the decisions of the California courts in this case reflect both a basic misunderstanding of the applicability of the "actual malice" standard to the publication of fictional works and a total misconception of the essential role of critical fiction in our society. The disregard shown for the Constitution, statutes and case law by the courts below thus threatens the very survival of the essential protections accorded publishers since this Court's 1964 reversal of the Alabama courts' decision awarding $500,000 in punitive damages against the *New York Times* and civil rights advocates for the publication of a critical advertisement. This new threat arises from the California courts' imposition upon publishers of an unprecedented and enhanced duty to investigate, the fabrication of purported "actual malice" from untried and incorrect factual determinations made by an appellate court and the California courts' apparent inability to appreciate the basis for or effect of punitive damages awarded against publishers.

In a decision which the California Supreme Court inexplicably refused to examine, that state's Court of Appeal held that the publisher of a *novel* may be held liable

for punitive as well as compensatory damages if it does not immediately act to prevent a licensee's distribution of the fictional work—pending the conclusion of a full independent investigation—once it has been notified in the most general terms that the work might libel an individual and regardless of the fact that at the time of publication the publisher neither knew of nor even suspected the presence of any alleged defamatory material in the work. As we shall demonstrate herein, the Court of Appeal's decision awarding punitive damages in a completely unprecedented instance is grounded upon an untried misperception of the facts of this case[2] and completely ignores the fact that the publication in issue is a fictional work. If allowed to stand, the California decisions below would not only drive a wedge of suspicion between publishers and authors, but would enable any malcontent to effectively suppress a publication with as little as an unsubstantiated letter—thereby achieving by insinuation what he would be unable to accomplish by the operation of law.

A. The Underlying Facts

The novel around which the decisions below turn is entitled *Touching* and was published by Doubleday in January, 1971. The book was written by Mrs. Mitchell, a successful novelist and critic for the *New York Times Book Review* with credits including ten published novels,[3]

[2] *See* discussion at *infra* at 29.

[3] *Naked in Babylon,* New American Library, 1960; *Someone's in the Kitchen with Dinah,* Doubleday, 1962; *The War Babies,* Coward-McCann Publishers, 1966; *Sweet William,* World Publishing, 1967; *The Pretenders,* World Publishing, 1969; *Touching,* Doubleday, 1971; *Kingdom Come,* Putnam's, 1973; *The Motherland,* Simon & Schuster, 1974; *The Aristocrats,* Playboy Press, 1975; *Ladies in Waiting,* MacMillan, 1979.

a volume of poetry,[4] a book of meditations,[5] magazine articles and a Broadway play.

In 1969, Kenneth McCormick ("Mr. McCormick"), who had been Doubleday's Editor-in-Chief for thirty years, was contacted by Mrs. Mitchell's literary agent, who told him of Mrs. Mitchell's plans to write a novel about a newly emerging type of encounter group "therapy." Impressed with the performance of Mrs. Mitchell's latest novel, *The Pretenders,* Doubleday, on December 15, 1969, entered into a contract for the publication of the novel which would become *Touching.* That contract included an express warranty that *Touching* would contain no matter that was libelous or could otherwise infringe upon anyone's rights. Mrs. Mitchell also indemnified Doubleday fully for any breach of this express warranty.[6]

Mr. McCormick met Mrs. Mitchell for the first time when she subsequently came to New York from her home in California to disuss plans for *Touching.* At that meeting in February 1970, Mr. McCormick specifically informed Mrs. Mitchell that none of the characters in her novel should be or resemble actual individuals. She assured him that they would not.

Upon receipt and review of the manuscript for *Touching* later that spring, Mr. McCormick phoned Mrs. Mitchell in California with his general comments and again inquired whether any characters in the novel were identifi-

[4] *Changes,* Nash Publishing, 1973.

[5] *How to Survive in Suburbia When Your Heart's in the Himalayas,* Wyden Books, 1976.

[6] *See* Exhibit 1, paragraph 21.

able. Mrs. Mitchell again assured him that none of the characters resembled any actual, living individuals. Satisfied with the manuscript, Mr. McCormick then sent *Touching* to press for publication in early January of 1971 of an initial hardcover printing of 35,000 copies. Paperback rights were then licensed to the New American Library on August 20, 1971,[7] in accord with Doubleday's usual practice of not publishing the "mass market" paperback editions of hardcover books it published.

Touching presents the story of two bright married women who, in search of something missing in their lives, attend an intense weekend nude encounter workshop in southern California. At the time, there were at least one or two dozen "therapists" in the region conducting such sessions, in which the patients, or customers, would remove their clothing and participate in various group activities directed by the guru-type instructor. In researching her novel, Mrs. Mitchell had attended one of these sessions, conducted by Paul Bindrim ("Bindrim").

Drawing on her experiences, and through the vehicle of fiction, Mrs. Mitchell examined the "search" undertaken by these two lonely women, and in so doing sketched a critical portrait of this type of "therapy" and traced what she regarded to be its tragic effects upon those who had subjected themselves to such bizarre sessions.

Despite the fact that the dust jacket, the dust jacket flap, the hardcover and the title page of *Touching* make clear that it is a novel, Bindrim apparently became so concerned at this indictment of his "profession" and the leader of

[7] *See* Exhibit 2.

the encounter group in Mrs. Mitchell's novel that he caused his attorneys to write to Mrs. Mitchell[8] and to Doubleday[9] on February 26, 1971 demanding, *inter alia,* that all production and distribution of the book cease immediately.

Upon receipt of that letter on March 2, 1971, Mr. McCormick immediately contacted Mrs. Mitchell in California and received a *third* assurance from her that the characters in *Touching* were fictional and did not resemble any living persons. On March 8, 1971, Doubleday's Business Manager conveyed Mrs. Mitchell's denials of character identifiability to Bindrim's attorney in a letter[10] which clearly evidences that, in conferring with Mrs. Mitchell, confronting her with Bindrim's allegations and receiving her further assurances that the work was entirely imaginary, Doubleday had done all that could be expected of it and, indeed, had taken every possible investigatory step reasonably open to it to insure that the work and the characters therein were fictional.

B. The Proceedings Below

1. The Superior Court

This case arose out of a complaint brought by Bindrim against Mrs. Mitchell and Doubleday for the publication of the hardback edition of *Touching* almost one year after publication occurred. Significantly, and of particular note because of subsequent developments in the Court of Appeal (as discussed in subsection 2), Bindrim did not join New American Library, the paperback licensee of the novel,

[8] *See* Exhibit 3.

[9] *See* Exhibit 4.

[10] *See* Exhibit 5.

as a defendant. The only claim against Doubleday alleged libel on the theory that Bindrim was identifiable as the leader of the encounter session in *Touching* and that the novel thereby cast him in an unfavorable light.

At trial of this action in the California Superior Court, Bindrim stipulated that he was a public figure. Finding insufficient evidence to show that Doubleday acted "in reckless disregard of [the possible] result of the book's publication," the trial judge, in his Order denying Doubleday's motion for judgment notwithstanding the jury's verdict (C 1), struck a jury award of $25,000 punitive damages against Doubleday but nonetheless upheld separate awards of $25,000 compensatory damages each against Doubleday and Mrs. Mitchell. Because the trial court had expressly found no violation of the "actual malice" standard, Doubleday consequently appealed the award of any damages against it. Mrs. Mitchell also joined in this appeal and Bindrim filed a cross-appeal.

2. *The Appellate Courts*

The three-judge California Court of Appeal, in three opinions including a dissent by Presiding Justice Files, affirmed the judgment of the trial court but modified the damage awards, reinstating the punitive damage award of $25,000 against Doubleday and converting the two separate $25,000 compensatory damage awards into a single joint and several award for $50,000.

The Court of Appeal, just as the trial court, specifically recognized that Doubleday had not published the hardcover edition of *Touching* with "actual malice," as defined by this Court's decision in *New York Times* v. *Sullivan.* In-

deed, the court expressly held: "[t]here was nothing in the record to suggest that, prior to the hardback printing defendant Doubleday in fact entertained serious doubts as to the truth or falsity of the publication." (B 9.) Nevertheless, the Court of Apeal seized upon Doubleday's reaction to the letter from Bindrim's attorney as justification for reinstating punitive damages and affirming the award of compensatory damages. Notwithstanding the renewed assurances from Mrs. Mitchell after Doubleday had received that letter, the Court of Appeal found that, by permitting the paperback edition of *Touching* to be disseminated without first conducting its own independent investigation of the claims in the letter, Doubleday, despite the fact that it had no control over the paperback licensee, had acted with sufficient culpability to satisfy the "actual malice" standard applicable to publishers. The issue of whether Doubleday was liable for any damages allegedly resulting from the distribution of the paperback edition of *Touching* by New American Library was never raised in the case and, of course, never litigated. Presiding Justice Files strongly dissented, emphasizing the unconstitutionality of the majority's opinion because of its misunderstanding of the need for fostering critical fiction and because its decision would have the inevitable effect of legitimizing defamation claims based only upon the theory "when you criticize my occupation, you libel me."

On appeal from the Court of Appeal's decision, the California Supreme Court refused to grant a hearing and affirmed the decision of the court below, rendering its judgment on July 12, 1979.

Reasons for Granting the Writ

I. The Courts Below Refused to Recognize the Constitutional Protections Afforded to Publishers and Their Decisions Would Have an Inevitable and Severely Chilling Effect Upon the Free Expression of Ideas Under the First Amendment.

A. Doubleday's "Duty to Investigate"

By not allowing a publisher to rely upon the representations of an experienced author as to the identity of the characters in a novel, the decision of the Court of Appeal, affirmed without any hearing by the California Supreme Court, has created an intolerable situation whereby one vague letter to a publisher can have the effect of a completely unprecedented court-ordered injunction stopping the presses and preventing further dissemination of an already published fictional work pending completion of a full investigation into unsubstantiated claims of defamation. That decision is thus contrary to an unbroken line of decisions in which this Court has held the right to print critical ideas inviolate from damage awards except in the most egregious circumstances where clear and convincing evidence has established that a publisher has published with "actual malice." In thus holding a publisher liable for both compensatory and punitive damages in circumstances where it had scrupulously complied with all established industry practices for guarding against publication of defamatory material, the decisions of California courts must inevitably wither the concept as well as the observance of robust free speech so carefully nurtured under the First Amendment.

In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964), this Court dealt with a similar attempt to punish the publication of critical expression, and, citing the inevitably deleterious effect on the public of a "bookseller's self-censorship,"[11] refused to uphold the constitutionality of a rule which unnecessarily "dampens the vigor and limits the variety of public debate." The decisions of the California courts in this case thus present an analogous situation where the very existence of another "important outlet" for the dissemination of ideas, e.g. critical fiction, will be threatened because of publishers' apprehension of ruinous damage awards if they do not stop their presses in response to vague defamation claims while they verify representations made to them by experienced authors. Moreover, the decisions below evidence a complete indifference to the fact that *Touching* was represented to Doubleday as a work of fiction—a circumstance necessarily limiting Doubleday's, or any publisher's, ability to investigate claims made about that work by third parties.

It is particularly significant that in its decision holding Doubleday liable for punitive and compensatory damages, the Court of Appeal expressly held: "[T]here is nothing to suggest that Doubleday entertained [serious doubts as to the truth of *Touching*] prior to the hardback publication." (B 8.) With the question of whether the "truth" presented in a fictional work should even have been an issue in this case put to the side for the moment,[12] the basis for the majority's decision holding Doubleday liable for defamation was that the court felt Doubleday had an enhanced

[11] *See, e.g.,* Smith v. California, 361 U.S. 147, 153-54 (1959), quoted in the *New York Times* decision at 376 U.S. 278-79.

[12] *See* discussion at 24-25, *infra.*

"duty to investigate" once it received the letter from Bindrim's attorney demanding cessation of all publication and distribution of the novel. Thus, despite the fact that, after receiving the letter, Doubleday did inquire of Mrs. Mitchell whether any of the characters in *Touching* were identifiable, and despite her *third* unequivocal denial that any of the characters resembled living individuals, the Court of Appeal nonetheless found Doubleday to be so delinquent in its "duty to investigate" that it was guilty of "actual malice" toward Bindrim in permitting the already licensed paperback edition of the novel to be disseminated.

It is clear that the majority's opinion, written by Justice Kingsley, completely misunderstood the constitutional standards for determining a publisher's liability for defamation in public figure cases. As Justice Harlan stated in his opinion for the Court in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967):

> [A] "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.* (Emphasis added.)

Moreover, as the Court held in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 332 (1974): "[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth."

In this case it is not only clear that Doubleday acted as a responsible publisher, but that it did as much as could be

expected of any publisher of a fictional work. Upon receipt of the Bindrim letter, it went to the only individual in a position to know if any of the characters in *Touching* were identifiable—the author, Mrs. Mitchell. Having received her third denial that anyone was recognizable, Doubleday had exhausted the only avenue of inquiry open to it.

The California standard set by the Court of Appeal would require more, however. Specifically, the majority held that allowing the paperback edition of the novel to be disseminated[13] without first investigating Bindrim's charges was tantamount to acting with "actual malice" toward him and provided sufficient basis for the imposition of exemplary damages. The Court of Appeal's decision thus plainly violates the rule of *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968):

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

There was no evidence whatsoever that Doubleday published with, or at any time had, the kind of subjective awareness of probable falsity or that it intended to publish "calculated falsehoods" about Bindrim which could in any

[13] While the Court of Appeal believed that the paperback rights to the novel had been licensed *after* Doubleday's receipt of the letter from Bindrim's attorney (*see, e.g.,* B 7, B 9), Exhibits 2 and 4 clearly show that the paperback rights were licensed to New American Library on August 20, 1970, more than six months prior to Doubleday's March 2, 1971 receipt of that letter.

way justify a finding of its "actual malice" toward him. *See Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

While purporting to apply the *New York Times Co.* v. *Sullivan* test, the Court of Appeal thus enunciated a rule far more severe even than the "standard of the reasonable man or the prudent publisher" discarded in *St. Amant* v. *Thompson, supra*, 390 U.S. at 731. The current rule in California instead requires publisher omniscience under penalty of punitive and strict liability. That such a standard is plainly unconstitutional and completely unworkable is manifest especially from an examination of its resulting implications as to what a publisher would have to do in order to satisfy its requirements. It is this "next step" that neither the Court of Appeal nor the California Supreme Court apparently considered.

Confronted with the denial of an experienced author as to the identifiability of any characters in a fictional work, and knowing that she had expressly warranted that nothing in *Touching* would be libelous and had backed this warranty up with an indemnification, Doubleday, in dealing with what it knew to be a work of fiction, had a choice to believe Mrs. Mitchell or not. If it chose *not* to believe its author, however, it faced another dilemma, for, as *Touching* had been represented to it as a work of fiction, there was nothing which it could investigate. Recourse to Bindrim himself, of course, would have hardly yielded a satisfactory or unbiased account,[14] since Bindrim had already made known

[14] Moreover, despite the fact that Doubleday had quickly answered Bindrim's original demand letter and explained its investigatory steps and conclusions (*see* Exhibit 5), Bindrim never attempted to further clarify the unspecified allegations made in his vague letter and instead waited nearly a full year to commence his action against Mrs. Mitchell and Doubleday.

his intention to bring suit against Mrs. Mitchell and Doubleday.[15]

But even more importantly, the letter which the Court of Appeal regarded as so dispositive of Doubleday's enhanced "duty to investigate" gave the publisher no indication of what specifically it was that Bindrim considered to be defamatory. The letter to Doubleday demanded cessation of all publishing and distribution of the novel "[f]or the reasons stated in" the separate letter to Mrs. Mitchell. Significantly, the heart of that letter stated:

> [I]t has come to my attention that you have been appearing on television and before the public holding yourself out as an authority on nude encounter workshops. From your said appearances, as well as from the book, it is unmistakable that the "Simon Herford" mentioned in your book refers to my client. *In these appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops.* Exhibit 3 (emphasis added).

The thrust of the letter is that Bindrim was concerned not so much with the presence of unspecified libels allegedly directed at him, but that in personal appearances Mrs. Mitchell had criticized the therapeutic worth of nude en-

[15] But even had Doubleday gone to Bindrim to investigate his claims of identifiability with the "therapist" in the novel, instead of finding the Simon Herford, described in the novel as a doctor of medicine and psychiatry and a fat Santa Claus with distinguishing long white hair, white sideburns, a beard, cherubic rosy face and rosy forearms, it would have found someone who was not a doctor at all (much less of medicine and psychiatry) and who had very short hair and was clean-shaven.

counter sessions. As such, the criticism was of the technque, not of an individual. Clearly, Mrs. Mitchell's opinion of nude encounter sessions was constitutionally protected (*see, e.g., Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 339-40), and Doubleday, in reviewing the letters from Bindrim's attorney, was certainly not liable in defamation under the standards enunciated in any of this Court's publishing decisions because it had concluded from all the available information that it was unnecessary to stop distribution of *Touching* on the basis of Bindrim's unsubstantiated allegations.

In reviewing the same materials, the Court of Appeal found to the contrary. Indeed, it held that by not conducting further investigations, Doubleday had acted not with negligence, or even gross negligence, but with "actual malice" toward Bindrim:

> [T]he jury was entitled to find that Mitchell's assurance to Doubleday was not sufficient to insulate Doubleday from liability and that Doubleday had some further duty to investigate. The jury could have inferred that at that point Doubleday either had serious doubts, *or should have had serious doubts,* as to the *possibility* that plaintiff was defamed by "Touching" and that at that point Doubleday had some duty to investigate. B 9-10 (emphasis added)(footnote omitted).

The foregoing excerpt from the Court of Appeal's decision establishes that it adopted an improper and constitutionally defective standard for measuring Doubleday's conduct. Clearly, the test is not what a publisher "should have" *suspicioned* as to the "possibility" of defamation,

but whether it had actual knowledge of falsity or subjective awareness of probable falsity of the underlying facts in its publication. *Gertz* v. *Robert Welch, Inc., supra; New York Times Co.* v. *Sullivan, supra; cf. Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967). Indeed, liability for compensatory damages could only be found after a showing by clear and convincing evidence of "highly unreasonable conduct" which was an "extreme departure" from the standards ordinarily adhered to by the press. Punitive damages could only have been justified upon the same evidential showing plus a showing of Doubleday's express "ill will" toward Bindrim. *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. at 158, 161.[16] Neither factor was present in this case and both the trial court and Court of Appeal have conceded as much. *See* B 8-9 *and* C 3.

B. The Effect of Fiction

As shown, the fact that Mrs. Mitchell had represented *Touching* as a completely fictional work necessarily restricted Doubleday's ability to investigate "the underlying facts" of the novel. Precisely because there *were* no underlying "facts" which could be investigated, Doubleday was forced to rely upon the repeated representations of, and warranties extended by, Mrs. Mitchell.

Review of the majority's opinion in the Court of Appeal demonstrates that the court misunderstood not only the constitutional tests it should have applied, but the facts of the case as well. Specifically, the original text of the majority's opinion (*i.e.,* that which was released for publication prior to the court's issuance of modifying orders in

[16] *See* discussion at 32, *infra.*

response to defendants' motion for a rehearing) is replete with statements showing that the court believed Mrs. Mitchell (and by inference Doubleday) possessed actual transcripts of the encounter session she had attended and that she had intended to "report" the facts therein as if she were writing a news account. In fact, Mrs. Mitchell had no such tape or transcript and never intended to write any more than a work of *fiction* expressing her opinion of one of society's current "fads."

For convenience, several of the more palpable indications of the court's misperception of the facts are set out below. These excerpts demonstrate that the Court of Appeal failed to appreciate the fact that *Touching* was clearly intended and presented as a work of fiction:

[1] The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings *Mitchell* had taken of the actual sessions. B 4 (emphasis added).

[2] Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. B 6.

[3] Mitchell's reckless disregard for the truth was apparent from the knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions and had transcripts of actual conversations between plaintiff and the participants, there can be no suggestion that she did not know the true facts. B 7-8 (footnote omitted).

[4] Plaintiff was identified as Herford by several witnesses and defendant's own tape recordings of the marathon session show that the novel was based substantially upon plaintiff's conduct in the nude marathon. B 12.

[5] Our inquiry then, is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: *i.e.*, substantially inaccurate description of what actually happened. B 14.

[6] Defendants here rely on the cases which have considered the difference in published materials between factual statements and matters of mere opinion. . . . [W]e do not feel that those cases necessarily express the rules applicable where, as here, the published material purports to state actual facts concerning the characters in a novel. B 14.

[7] Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. B 16-17.

The majority later modified its opinion with regard to three of these excerpts,[17] but even in its "corrected" form, their opinion still evidences a basic misunderstanding of the facts, of the role of fiction as a vehicle to reflect and comment upon society's mores, and of the need to foster rather than endanger this important outlet for the dissemination of critical ideas.

[17] "Mitchell" was changed to "Bindrim" in the first passage, the words "and had transcripts of actual conversations between plaintiff and the participants" were deleted from the third passage, and the word "plaintiff's" was substituted for the word "defendant's" in the fourth passage.

Just as all fiction and, indeed, all published works must be in some part a product of an author's background and development,[18] Mrs. Mitchell had to have drawn upon her experiences in writing *Touching* and, through the clearly labeled vehicle of a novel, was entitled to express her views about a kind of "therapy" which was then very much in the public eye. Similarly, Doubleday was constitutionally entitled to believe her representations as to the fictional nature of the work and publish what it considered to be a novel expressing Mrs. Mitchell's view of a particular occupation.

By definition, a work of fiction is imaginary and is not intended or understood to be the story of any real individual.[19] In borrowing upon his experiences, the author of any successful novel dealing with present-day situations makes his book relevant to his readers by making it believable. Thus, in describing a "therapy" technique in a work of fiction, the author does not libel individuals but only comments upon the practices he reviews. Similarly, in writing about a group or occupation, an author does not libel its members and practitioners but only engages in "fair comment" and a constitutionally protected expression of his opinion.[20] Merely casting "suspicion" upon

[18] *See* People v. Charles Scribner's Sons, 205 Misc. 818, 821, 130 N.Y.S.2d 514, 517-18 (Magis. Ct. Kings County 1954).

[19] *See, e.g., Ballantine's Law Dictionary* 468 (3d ed. 1969).

[20] *Cf.* Brewer v. Hearst Pub. Co., 185 F.2d 846 (7th Cir. 1950) (vivisectionists); Service Parking Corp. v. Washington Times Co., 67 App. D.C. 35, 92 F.2d 502 (1932) (parking lot owners); Gilbert v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823, *aff'd*, 15 N.Y.2d 1063, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965) (members of a law firm). That the instant case involves a novel where the name, age, professional credentials and physical description of the fictional character all bear no resemblance whatever to respondent makes the error below all the more apparent.

such a group or indirectly criticizing a public figure who is a member of that group and "could have been" injured in his profession by that criticism is clearly not a sufficient ground upon which to base a finding of publication with "actual malice" (*see Rosenblatt* v. *Baer*, 383 U.S. 75, 82 n.6 (1966)), and any rule not recognizing this fact errs at the same juncture as did the Alabama Supreme Court in concluding that statements "must have been" libelous of an otherwise unspecified public official by virtue of his "position" in a particular group or profession. *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 289.

In refusing to recognize these established principles, the majority of the Court of Appeal retreated to a position which has been thoroughly discredited at least since the time of this Court's decision in *New York Times Co.* v. *Sullivan*. Perhaps best illustrative of this fact is the excerpt from Presiding Justice Files' dissent in the Court of Appeal:

> Plaintiff's brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plaintiff's are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times* v. *Sullivan, supra*, 376 U.S. 254. Kalven wrote: "There is revealed a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first

place. . . ." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 The Supreme Court Review 191, 199. B 28-29.[21]

The Court of Appeal apparently misapplied the applicable constitutional tests because it considered Mrs. Mitchell's novel to be an intentionally defamatory news-type report of the actual facts—facts which it thought were available to her because it erroneously believed that she had a full transcript of the encounter session. As shown, that was not the case. Accordingly, it seems probable that the majority of the Court of Appeal held Doubleday to an enhanced "duty to investigate" precisely because it thought Doubleday could have asked Mrs. Mitchell to produce tapes of the session for a comparison of the recorded account with that appearing in the novel. In fact, however, Mrs. Mitchell had no such tapes. There was no one beside the author for Doubleday to interview and no extrinsic materials for it to inspect. Doubleday believed that it was publishing a novel, and, having received the author's assurances that *Touching* was a work of fiction, could do no more by way of investigation than it did.

The Court of Appeal's decision thus calls into question the very applicability of the "actual malice" standard to

[21] The next sentence in Professor Kalven's article makes this excerpt particularly relevant:

> As it turned out, the Court did not have to confront this logic, which remains temporarily buried for resurrection at some later time. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 The Supreme Court Review 191, 199.

The issues addressed in this petition thus squarely present for a final determination the logic of Professor Kalven's observation—some fifteen years after this Court's decision in the *New York Times* case.

publishers of fictional works. Even the decision in *Curtis Publishing Co.* v. *Butts, supra,* speaks of a publisher's duty in terms of "the standards of investigation *and reporting* ordinarily adhered to by responsible publishers" (388 U.S. at 155 (emphasis added)), yet a publisher's "duty to investigate" vis-a-vis a work of fiction cannot be judged in the manner as his "duty to investigate" before the publication of a non-fiction work. He cannot investigate "the underlying facts" of a novel as he can those of a news story or journalistic expose. Instead, the publisher of fiction must depend upon the representations of his author as to the non-identifiability of the characters in a novel. Thus, particularly when the author is an experienced novelist, in confronting that author with charges of identifiability made by a third person, the publisher has satisfied every standard of investigation that can constitutionally be applied to him. Clearly, his acts cannot then be held to evidence "highly unreasonable conduct constituting an extreme departure" from the standards applicable to publishers of fictional works.

C. The Effect of the Decisions Below

The imposition of compensatory and punitive damages upon a publisher when it has complied with every possible safeguard to prevent the publication of defamatory material is, of course, unconstitutional and antithetical to the rationale of each of this Court's publishing decisions since *New York Times Co.* v. *Sullivan.* But moreover, the decision of the Court of Appeal is dangerous not just for its inevitable chilling effect upon free expression but also because of its potential for the imposition of prior restraints upon the press.

The threat to publishers from the Court of Appeal's decision principally arises because of the court's assessment of when Doubleday's enhanced "duty to investigate" actually arose:

> Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition. B 7.

Accordingly, the sequence of three events in 1970 and 1971 becomes crucial to an understanding of the full effect of the Court of Appeal's decision. First, the paperback publication rights to the novel were licensed to New American Library on August 20, 1970. Secondly, *Touching* was published by Doubleday in early January 1971 with 35,000 copies put into distribution for sales throughout the country. Finally, the demand letter from Bindrim's first California attorney to Doubleday was received in New York on March 2, 1971.

The foregoing excerpt from the majority's opinion makes clear that the finding of "actual malice"—and therefore the justification for imposition of compensatory and punitive damages against Doubleday—was based upon Doubleday's failure to prevent a licensee from distributing the paperback edition of *Touching* pending satisfactory completion of the independent investigation which was retroactively required by the Court of Appeal. Notwithstanding the fact that Doubleday had already done all that it could do by asking Mrs. Mitchell about Bindrim's claims, the Court of Appeal therefore drew a distinction as to Doubleday's culpability based upon who was distributing the novel. The court did *not* hold that *Doubleday* had to

stop dissemination of *its* 35,000 hardback copies of *Touching,* but rather that it should have prevented the distribution of the already licensed *paperback edition,* printed by another publisher, while it conducted its own independent "investigation."

Initially, the Court of Appeal's rule is unworkable because it assumes the existence of verifiable facts—an impossibility by the very definition of fiction. But even apart from its other obvious internal inconsistencies and enormous resource costs, this "California rule" would clearly cripple the publishing industry, engender suspicions of the worst kind between publishers and authors and would make a mockery not only of the right of free expression but of due process and thus the basis for our judicial system. *Cf. Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Near* v. *Minnesota,* 283 U.S. 697 (1931). Moreover, that the Court of Appeal's opinion is aimed at punishing the distribution of a work of fiction and not at its publication in no way diminishes the clearly unconstitutional effect of its decision, for it has long been held that the freedom to circulate ideas is to be accorded the same protection as the freedom to publish them. *Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938); *Ex parte Jackson,* 96 U.S. 727, 733 (1877).

Under the "California rule," any individual or series of individuals, each with a single abstruse claim, could so hamstring the efforts of the press as to make publication of any critical fictional work virtually impossible. Indeed, since inquiry of the author would not be suffiicent to satisfy the "California rule," even fictional works which had not yet been published could be effectively "enjoined" from

distribution by vague, unsubstantiated claims of character identifiability. As a result, publishers, under threat of compensatory and punitive damage awards for "actual malice," would operate under a self-imposed censorship. *See New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 277-79. Fictional works, which one would think would be more able to accommodate the free expression of opinion, would therefore be more restricted than would non-fiction publications, where "underlying facts" actually do exist and can be verified. In allowing individuals to effectively bypass the courts for relief which they would in any event be unable to obtain under the First Amendment, the Court of Appeal has thus inadvertently created a situation where anyone could prevent the publication even of current fictional works having a different viewpoint than their own with as little as one vague demand. *Cf. Near* v. *Minnesota, supra* (state statutory scheme requiring *judicial* approval of a system of prior restraints which was intended to avoid the creation of public scandal by statements not necessarily false struck down as violative of First and Fourteenth Amendments). Accordingly, this Court cannot allow one state to impose such a standard because the clear result thereof would be a requirement that all publishers be governed by California's "lowest common denominator," which, in turn, would therefore have a deleterious impact on the dissemination of ideas in interstate commerce. Clearly, therefore, because of its inevitable chilling effect and implications of prior restraint, this "California rule" cannot be allowed to stand.

II. In Holding Doubleday to Have Acted with "Actual Malice" in Not Preventing the Continued Distribution of *Touching* by a Licensee the California Courts Have Created an Intolerable and Unconstitutional Situation Whereby the Untried Acts of an Unjoined Licensee Can Be Gratuitously Employed by an Appellate Court as a Means to Impose Liability for Compensatory and Punitive Damages Upon a Wholly Innocent Party.

A. The Absence of a Hearing

One of the most shocking aspects of the Court of Appeal's decision imposing liability upon Doubleday is that it was never in the contemplation of the jury, the trial court, or even the plaintiff, to hold Doubleday responsible for not preventing the continued distribution of *Touching* by a licensee. Indeed, Bindrim never joined nor even attempted to join, New American Library, the publisher of the paperback, as a defendant in this case. Moreover, no testimony was adduced at trial which could in any way justify a finding of liability based upon this unorthodox and completely unfounded pretext. *Cf. Ray* v. *Norseworthy,* 90 U.S. (23 Wall.) 128, 136 (1874). Notably, the Court of Appeal's determination was based upon an erroneous understanding of the facts, an occurrence which is not surprising in light of the absence of even the most perfunctory hearing on the sequence of events surrounding Doubleday's receipt of Bindrim's vague demand letter.[22] The Court of Appeal's decision thus clearly violated the maxim that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). *Accord, Mullane* v. *Central*

[22] *See* note 13, *supra.*

Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *Georgia Railway & Electric Co.* v. *Decatur*, 295 U.S. 142, 171 (1935); *cf. Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Accordingly, the Court of Appeal's gratuitous justification for compensatory and reinstatement of punitive damages based upon this arbitrary, untried and uncontemplated theory violated Doubleday's right to due process under the Fourteenth Amendment as well as the clear mandate of *Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917). *Accord, Hovey* v. *Elliott*, 167 U.S. 409 (1897); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876).

B. The Absence of Any Act of Communication of Libelous Material

The effect of the Court of Appeal's decision is to equate Doubleday's *not* acting to *prevent* distribution of the licensed paperback edition of *Touching* with the volitional act of "communicating" a libel. As a result, the Court of Appeal has stood the law of libel on its head. Now, instead of requiring the communication of a defamatory statement as essential to statement of a libel claim, the California courts would hold that the *absence* of any actual communication is not only sufficient to state a claim in defamation, but is dispositively probative of the non-actor's "actual malice."

Clearly, the imposition of liability for making defamatory statements hinges upon the active communication of such statements to some third party. *See* W. Prosser, *Handbook of The Law of Torts*, 766 (4th ed. 1971). In this case, however, Doubleday took no actions whatever which

might in any way be interpreted as "communication" or "publication" of any libelous statement; yet, the Court of Appeal still found Doubleday to have acted with "actual malice." The decisions below therefore fail to recognize the critical absence of a basic prerequisite (the "communication" of defamatory material) essential even to the successful maintenance of a cause of action sounding in libel.

Moreover, the Court of Appeal's decision is contrary to the express holding of the trial court that Doubleday had *not acted* with reckless disregard of whether it was publishing defamatory material. These factors further evidence the inability of the courts below to comprehend and properly apply the constitutional safeguards to be adopted in First Amendment cases. Doubleday clearly surpassed the standards of *St. Amant* v. *Thompson, supra*, acted as a responsible publisher of fiction and in no way departed from the standards of investigation ordinarily adhered to by responsible publishers. Simply, it did not have subjective awareness of probable falsity, did not publish any "calculated falsehood" and cannot, therefore, be held to have acted with the "actual malice" which is at least a precondition to the imposition of compensatory and punitive damages in public figure libel actions.

III. The Imposition of Punitive Damages Upon Doubleday Typifies the Lower Courts' Misperceptions and Misapplications of the Law and Was Not Only Unjustifiable Under California Law But Was Also Plainly Violative of the Constitution.

Notwithstanding this Court's publishing decisions from the last fifteen years, the California Civil Code furnishes the following definition for "actual malice:"

> "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice. Cal. Civil Code § 48a(4)(d) (1954).

Section 48a of the California Civil Code further provides:

> [N]o exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast. Cal. Civil Code § 48a(2) (1954).

Divorcing for the moment the questions of whether, under any reading of the facts in this case, Doubleday could have been guilty of the actual knowledge or reckless disregard necessary to support a finding of constitutional "actual malice" under the rule of *New York Times Co.* v. *Sullivan,* it is manifest that the Court of Appeal's imposition of punitive damages upon a publisher under the circumstances presented herein cannot be constitutionally sanctioned. Indeed, it would be hard to conceive of circumstances where punitive damages could be *less* appropriate than under the facts of this case.

Clearly, punitive damages in defamation cases can only be imposed upon a finding of "actual malice plus." That "plus" was explicitly recognized and defined in *Curtis Publishing Co.* v. *Butts, supra,* where this Court held: "[P]unitive damages require a finding of 'ill will' under general libel law." 388 U.S. at 161. *See also Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245, 251-52 (1974). The law of California was thus in accord with the precedents of this Court (at least with regard to punitive damages), until the Court of Appeal's decision in this case. *See, e.g., Alioto* v. *Cowles Communications, Inc.,* 430 F. Supp. 1363, 1372 (N.D. Cal. 1977) (specifically drawing the distinction between the types of evidence required under California law for imposition of compensatory and punitive damages).

The Court of Appeal, however, found that because it was able to fabricate circumstances purportedly showing Doubleday's constitutional "actual malice" under the *New York Times Co.* v. *Sullivan* rule, it could also impose punitive damages under the same evidential standard:

> And the standard for punitive damages for libel of a public figure is "actual malice," under the *New York Times* case, not hatred. Since all that is required for punitive damages of a public figure is actual malice and not hatred, and since both Doubleday and Mitchell had "actual malice," it follows that punitive damages *could* have been awarded against both defendants. But since punitive damages are discretionary and wealth may be taken into account, it was proper to award punitive damages against one defendant, and not the other. B 10-11.

The decision of the Court of Appeal is clearly unconstitutional and its effects will be calamitous. The court, in

one breath, erased the distinction between the proof required for imposition of punitive as against compensatory damages and has thus created an intolerable situation in California where a jury's unbridled whim may again threaten the continued existence and determination of publishers to publish critical ideas. *Cf. New York Times Co.* v. *Sullivan, supra.* Further, the decision ignores the facts of this case, for under no circumstances can Doubleday be shown to have had "a state of mind arising from hatred or ill will toward the plaintiff." Dispositively, when Doubleday committed the only "act" with which it can be constitutionally held responsible—that of actually publishing the hardback edition of *Touching*—it did not even know about the *existence* of Bindrim. When it subsequently received the vague demand letter from Bindrim's attorney, it made the fullest investigation possible.[23] Yet, ignoring these facts and heedless of the long-standing distinction between "actual malice" and common law malice, the Court of Appeal held Doubleday liable for punitive damages just as if it had indeed published "calculated falsehoods" about Bindrim. *Cf. Garrison* v. *Louisiana, supra.*

The decision of the Court of Appeal thus clearly violates the California Civil Code, the case law of California and each of this Court's First Amendment publishing decisions since *New York Times Co.* v. *Sullivan.* Moreover, the decision imposes punitive damages on the one defendant least able to effectively change its procedures so as to avoid further violations. *See Curtis Publishing Co.* v.

[23] Even if it had not made the renewed inquiries of Mrs. Mitchell, Doubleday, of course, could not have been constitutionally held to have acted with "actual malice" or "ill will" as defined by the California statute, for "[f]ailure to investigate does not in itself establish bad faith." St. Amant v. Thompson, *supra,* 390 U.S. at 733.

Butts, supra, 388 U.S. at 161. Manifestly, the effect of the current "California rule" as it applies to the imposition of punitive damages to publishers in libel actions is to hold them responsible in both compensatory and punitive damages for not being omniscient. Such a "rule," of course, flies in the face of the whole concept of First Amendment protections for the press and, at least insofar as fictional works are concerned (where it is impossible to investigate "the underlying facts"), the judicial enactment of this "rule" is tantamount to the imposition of a strict liability standard for the innocent publication of defamatory material. Accordingly, the "California rule's" imposition of punitive damages without the scintilla of a showing of common law malice clearly violates the established protections accorded publishers under both state and federal law and cannot be allowed to stand.

Conclusion

For the foregoing reasons, Doubleday's petition for a writ of certiorari should be granted and the decisions of the courts below should be reversed.

Respectfully submitted,

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October 9, 1979

EXHIBITS

Exhibit 1

E 1

Agreement made this 15th day of December, 1969

between DOUBLEDAY & COMPANY, INC., of Garden City, N.Y., hereinafter called "Publisher," and

of Gwen Davis 9492 Rembert Lane, Beverly Hills, Calif. 90210
c/o Robert Lantz-Candida Donadio Literary Agency, Inc.
111 West 57th Street
New York, N. Y. 10019

hereinafter called "Author," being the Author and Proprietor of a work as presently entitled:

an Untitled Novel, TOUCHING

hereinafter called "the work."

RIGHTS GRANTED

1. (a) Author grants to Publisher for the full term of copyright available in such countries included within the territory covered by this Agreement, including renewals and extensions, under any copyright laws now or hereafter in force the sole and exclusive right to print, publish, copy, and vend the work and the other rights hereinafter referred to on the terms set forth, throughout the

TERRITORY

United States of America, Canada and the Philippine Islands; territory other than the U.S.A., the Philippine Islands and the British Commonwealth (exclusive of Canada) being an open market for copies produced in the English language.

(b) Author hereby requests and authorizes Publisher to engage Doubleday Canada Limited to publish the work in Canada, with the same force and effect as if Author had himself engaged Doubleday Canada Limited so to publish.

(c) During the term of this Agreement Author will not exercise or dispose of any reserved rights, nor cause to be published any version of the work or any similar version of the work in such a way as to affect adversely the value of any of the rights granted to Publisher hereunder.

PUBLICATION

2. Publisher shall publish the work at its own expense, in the style and manner and at the price which it shall deem best suited to its sale and under such original imprint as it deems advisable. Jacket design and text subject to Author's reasonable approval.

ADVANCE ROYALTY

3. Publisher shall pay to Author, or his duly authorized representative, the following advance which shall be charged against Author's earnings under this Agreement:

65,000 - pd 12/10/69
35,000 - pd 1/6/70

One Hundred Fifty Thousand Dollars ($150,000.00), payable Sixty Five Thousand Dollars ($65,000.00) on receipt of this signed agreement; Thirty Five Thousand Dollars ($35,000.00) on demand during January 1970; Twenty Five Thousand Dollars ($25,000.00) on receipt of complete satisfactory manuscript, and Twenty Five Thousand Dollars ($25,000.00) on publication date.

ANNUAL PAYMENT LIMITATION

4. Notwithstanding anything to the contrary in this Agreement, Publisher shall in no event pay to Author out of the sums accruing to Author more than Sixty Five Thousand Dollars ($65,000.00) during any one calendar year. In the event the sums in Author's credit exceed such annual maximum payment, such excess shall be retained by Publisher in its general funds and shall be paid by it to Author in successive calendar years provided each yearly payment shall not exceed the maximum herein stated.

TRADE ROYALTY IN THE UNITED STATES

5. Publisher shall pay to Author:

(a) On all copies, less returns, of the regular trade edition sold by Publisher in the United States of America (except as hereinafter set forth), the following royalties based on the retail price:

Fifteen per cent (15%).

CANADIAN ROYALTY

(b) On all copies of the regular trade edition of the work sold in the Dominion of Canada, an amount equal to five per cent (5%) of the retail price in the United States of America.

OTHER EXPORT MARKETS

(c) On all copies of the regular trade edition of the work sold by Publisher to other export markets, an amount equal to eight per cent (8%) of the United States of America retail price.

MAIL ORDER

(d) On all copies of the work sold by Publisher (less returns) through an offer made by its Mail Order Department, as distinct from sales made to booksellers or jobbers, five per cent (5%) of the Mail Order retail price, exclusive of shipping and handling charges.

SPECIAL SALES

(e) On all copies of the regular trade edition of the work sold through Publisher's Special Sales Department, as distinct from sales made to booksellers or jobbers, five per cent (5%) of the retail price, except as hereinafter provided.

(f) On all copies of the work acquired from Publisher's affiliates or subsidiaries and sold through Publisher's Special Sales Department, Publisher shall pay to Author five per cent (5%) of the proceeds to Publisher of such sales, exclusive of shipping and handling charges.

(g) In the event Publisher's Special Sales Department shall license others to produce the work or any part thereof, Publisher shall pay to Author fifty per cent (50%) of the license fees and/or plate rentals received by Publisher for such license.

(h) In the event Publisher's Special Sales Department shall publish a special subscription edition of the work, Publisher shall pay to Author five per cent (5%) of the proceeds to Publisher of the sale of copies of such special edition, exclusive of shipping and handling charges.

(i) On sales for premium use of copies of the work, excepting thereform, or special editions thereof, Publisher shall pay to Author five per cent (5%) of the proceeds to Publisher of such sales, exclusive of shipping and handling charges. On sales of copies of the work for premium use acquired from Publisher's affiliates or subsidiaries, Publisher shall pay to Author five per cent (5%) of the proceeds to Publisher of such sales, exclusive of shipping and handling charges.

PUBLISHING RIGHTS OUTSIDE OF UNITED STATES AND TRANSLATIONS

6. Author grants to Publisher the sole and exclusive right to sell English language and translation rights [illegible] to the work in book or serial form (in full length, condensed, or abridged versions) for publication [illegible] other than the United States of America, for publication on the territory specified in Paragraph 1(a). Publisher shall pay to Author fifty per cent (50%) of the net proceeds of such sales.

BOOK CLUBS

7. Author grants to Publisher the sole and exclusive right to license the right to print, publish, and sell an edition of the work to a book club including any book club owned or operated by a subsidiary or affiliate of Publisher or in any organization which operates on the basis of plate rental or purchase of book club copies (in full-length, condensed, or abridged versions). Publisher shall pay to Author fifty per cent (50%) of the net proceeds of such licenses received by Publisher.

MICROFILMED FEB 3 1970

subject to Author's reasonable approval

REPRINTS

more than thirty percent of

ONE-PART MAGAZINE PUBLICATION

6. (a) Author may not sell the work for publication in full-length, condensed, or abridged version in one part before book publication without the prior written consent of Publisher.

(b) Author hereby grants to Publisher the sole and exclusive right to sell, in the territory specified in Paragraph 1, the work for publication in newspapers or periodicals in full-length, condensed, or abridged versions in one part before book publication. Publisher shall pay to Author seventy-five per cent (75%) of the net proceeds of such sales.

FIRST SERIAL

10. Author grants to Publisher the sole and exclusive right to sell, in the territory specified in Paragraph 1, the work or parts of it for publication in serial form in newspapers or periodicals and excerpts from the work for publication in newspapers or periodicals before publication in book form. Publisher shall pay to Author ninety per cent (90%) of the net proceeds of such sales (except on sales for serial publication in countries other than the United States under Paragraph 4 hereof).

SECOND SERIAL

11. (a) Author grants to Publisher the sale and exclusive right to sell, in the territory specified in Paragraph 1, the work or parts of it for publication in serial form in newspapers or periodicals and excerpts from the work for publication in newspapers or periodicals after publication in book form (provided such rights have not been retained by the purchaser of the first serial rights). Publisher shall pay to Author fifty per cent (50%) of the net proceeds of such sales (except on sales for serial publication in countries other than the United States under Paragraph 4).

(b) In making sales pursuant to Paragraph 4(b) 11(a) and 12, Publisher may deal directly with newspapers or periodicals or with those dealers in such literary rights commonly known as syndicates.

PERMISSIONS: EXTRACTS ANTHOLOGIES ABRIDGED VERSIONS

12. (a) Author grants to Publisher, in the territory specified in Paragraph 1 hereof, after publication of the work in book form, the right (1) to license for publication an adaptation of all or part of the work, and (2) to sell the work or extracts therefrom for use in periodicals or books (provided such rights have not been retained by the purchaser of the first serial rights), but not in its entirety in book form except as provided in Paragraphs 6, 7, and 8. Publisher shall pay to Author fifty per cent (50%) of the proceeds of such sales (except on sales for countries other than the United States of America under Paragraph 4 hereof).

(b) No payment shall be made to Author by Publisher for permission graciously given by Publisher, before or after publication of the work in book form, to publish extracts from the work to benefit the sale thereof.

MOTION PICTURES DRAMATIZATION PUBLIC READINGS

13. Author grants to Publisher the sole and exclusive right to sell motion picture rights, dramatic rights with or without music, public reading and other non-dramatic performing rights throughout the world to and in connection with the said work. Publisher shall pay to Author ninety per cent (90%) of the proceeds of such sales, except sound recordings Paragraph 16. Any sales of motion picture rights to the work may grant to the purchaser the right to publish, for advertising and exploitation, excerpts, summaries, and synopses of the work or dramatizations or motion pictures thereof, but no such excerpts, summaries or synopses shall exceed 7500 words in length, nor shall they appear as having been written by Author, nor shall they be offered to any person, firm, or corporation for a monetary consideration.

RADIO TELEVISION

14. Author grants to Publisher the sole and exclusive right to sell radio and/or television rights, throughout the world, in and to and in connection with said work. Publisher shall pay to Author ninety per cent (90%) of the proceeds of such sales.

COMMERCIAL RIGHTS

15. Author grants to Publisher the sole and exclusive right to sell, and to license others to sell, subject to the approval of Author, the commercial rights in and to Author's name and the work. "Commercial rights" shall be understood to mean the exploitation of Author's name in connection with the work, and of the work itself and all material including the characters contained therein through their use, plastication, or graphic exploitation on or in connection with merchandise. Publisher shall pay to Author fifty per cent (50%) of the net proceeds of such sales.

SOUND RECORDING FILMSTRIPS TEACHING MACHINES MICROFILM

16. Author grants to Publisher the sole and exclusive right to sell the work or parts of it for mechanical reproduction and transmission, including, but not by way of limitation (a) sound and picture recording, including phonographic, wire, and tape recording or any other method hereafter known or devised; (b) filmstrips; (c) programs for machine teaching; (d) microfilm and photocopying (except motion pictures), or any other method now or hereafter known or devised for information storage, reproduction, and retrieval. Publisher shall pay to Author fifty percent (50%) of the proceeds of such sales.

USE BY NON-PROFIT ORGANIZATIONS

17. Publisher is authorized to grant permission, at no charge and without paying royalty to Author, for use of the work by recognized non-profit organizations for the physically disabled, such as, but not limited to, the right to put the work into Braille or talking books.

RIGHTS NOT SPECIFIED

18. All rights not herein specifically granted to Publisher are reserved by Author.

SEMI-ANNUAL ACCOUNTING

19. (a) Publisher shall render statements of sales semi-annually as of April thirtieth and October thirty-first and make payment of monies due within four months thereafter. If the work has not earned the amount of royalties advanced or Author has received an overpayment of royalties or is otherwise indebted to Publisher, Publisher may deduct the same from any sums due or to become due Author under this Agreement.

(b) Publisher may, for the first three periods following publication, set up a reserve of fifteen per cent (15%) of the earnings due Author, to provide for returns.

(c) Publisher shall, on the written request of Author, cause the public accountants regularly employed by Publisher to furnish to Author a certified copy of his latest semi-annual royalty statement.

twenty

AUTHOR'S COPIES

20. Publisher shall furnish to Author, free of charge, XXX copies of the regular trade edition of the work as published, and should Author desire any more copies for personal use, they shall be supplied at one-half the retail price. Copies thus purchased shall not be resold. Author will be billed for these copies and payment shall be made within thirty (30) days of receipt of bill unless Publisher wishes to charge this amount to Author's royalty account, provided said account has earned royalties accrued over and above the advance royalty paid to Author.

WARRANTY

21. Author represents and warrants to Publisher that:

(a) The work is original.

(b) He is the sole author and proprietor thereof, and has full power to enter into this Agreement.

(c) The work is not in the public domain; has never before been published in whole or in part in any form and he has not entered into or become subject to any contract, agreement, or understanding with respect thereto other than this Agreement.

(d) If published, the work will not infringe upon any proprietary right at common law, or any statutory copyright, or any other right whatsoever.

(e) The work is innocent, and contains no matter whatsoever that is obscene, libelous, in violation of any right of privacy, or otherwise in contravention of law.

INDEMNITY

13. (a) Author shall indemnify and hold harmless Publisher from any claim, suit, or action, and any expenses or damage in consequence thereof, asserted by reason of Publisher's exercise or enjoyment of any of its rights hereunder or by reason of any warranty or indemnity made by Publisher in connection with the exercise of any such rights, as provided in subparagraphs (b), (c), (d), and (e) hereof.

(b) Publisher shall have the right to defend such claim, suit, or action by counsel of its selection and with the consent of Author to settle the same on such terms as it deems advisable.

(c) In the event a final judgment is entered against Publisher, Author shall be liable for and shall pay to Publisher the amount of said judgment and shall reimburse Publisher for any and all expenses incurred in said action, including counsel fees.

(d) In the event of a settlement, Author shall be liable for and pay to Publisher (1) fifty per cent (50%) of the amounts paid by Publisher in settlement and (2) fifty per cent (50%) of the amounts paid by Publisher for counsel fees and other expenses.

(e) In the event such claim, suit, or action is discontinued or dismissed without liability to Publisher, Author shall be liable for and shall pay to Publisher fifty per cent (50%) of the amounts paid by Publisher for counsel fees and other expenses.

(f) Publisher shall have the further right to withhold and apply any royalties or other sums due Author under this or any other agreement as security for Author's obligation under this Paragraph 13.

(g) The warranties contained in Paragraph 12 and the indemnities contained in this Paragraph 13 shall survive the termination of this Agreement.

Publisher shall have the right in its discretion to extend the benefit of Author's aforesaid warranties and indemnities to any person, firm, or corporation at any time and Author shall be liable thereon as if originally made to such person, firm, or corporation.

BREACH OF WARRANTY

14. In the event of a breach of any of Author's warranties or any default by Author in the performance of his indemnities, Publisher may at its election and without prejudice to any other right or remedy against Author hereunder this Agreement and in such event Author shall repay on demand to Publisher any advances against earnings or other sums paid to Author by Publisher.

COPYRIGHT

15. (a) Publisher shall take out copyright in name of Owen Davis Mitchell

and take all steps required to secure said copyright in the United States, and is authorized in its discretion to take out copyright in such other countries as may be covered by this Agreement. Author agrees to apply for the renewal of said copyrights on the expiration of the first term thereof, and authorizes Publisher to make such applications in his name. Author further agrees to assign to Publisher, if this agreement has not terminated previously, the sole and exclusive right to print, publish, copy, and vend the work, and the other rights reserved to herein, during the full terms of said renewal and extensions thereof, on the same terms and conditions as for the original copyright term.

(b) Author hereby authorizes Publisher to make Author a co-plaintiff with Publisher in any litigation against a third party for infringement of the copyright on the work, but without cost to Author. Any recovery from such litigation shall be applied first to reimburse Publisher for its expenses in connection therewith, and the balance shall be divided equally between Author and Publisher.

(c) Author agrees that in the event the present copyright law of the United States of America, or of any other country where the work is protected by copyright shall be amended or changed or a new copyright law is enacted so that the term of copyright is extended or the benefits thereunder enlarged, Publisher shall forthwith automatically become entitled to all of such enlarged benefits thereby conveyed for such extended term.

MANUSCRIPT: CHARACTER WITH DATE AUTHOR'S ALTERATIONS

16. (a) Author shall deliver to Publisher two (2) finally revised copies of the work, satisfactory to Publisher in content and form, including all illustrations and other graphic material committed to the work, in a form ready for reproduction, not later than November 1, 1970. see Rider attached

If Author delivers only one (1) finally revised copy of the work or if the second copy is not clean or legible Publisher may have the original manuscript duplicated and the expense charged to Author's royalty account.

(b) Author shall also deliver to Publisher an index, if required by Publisher, promptly after proof is available for making the index. If Author fails to supply all such index, illustrations, and other graphic material in a form ready for reproduction, Publisher may obtain it and charge the expense thereof against Author's earnings hereunder. It is understood that such material is considered a part of the work and that all rights granted and warranties and indemnities made to Publisher hereunder apply also to use of such material.

(c) If Author incorporates into the work any material previously published and not in the public domain, he shall procure at his expense written authorization satisfactory to Publisher to publish it in the work and shall deliver copies of such authorization to Publisher with the manuscript.

(d) The provisions of subparagraphs (a) and (b) hereof as to the character, condition, and time of receipt of the copies of the work are of the essence of this Agreement, and in the event of Author's default hereunder Publisher may, at its option, any time prior to actual publication of the work, terminate this Agreement without prejudice to any other remedy.

(e) Expenses of Author's proof corrections exceeding ten per cent (10%) of cost of composition shall be charged against Author's earnings hereunder.

(f) Any sums paid to Author as advance royalties or otherwise shall be returned to Publisher on demand if said copies are not delivered as provided in subparagraph (a) hereof.

(g) Author represents that he has retained a copy of the manuscript and the Publisher shall not be liable for any loss resulting to Author from a destruction or other loss of the copies delivered to Publisher unless Publisher shall have failed to carry appropriate insurance thereon, if the same is available and has been requested in writing by Author and at Author's expense.

REMAINDERS

17. If Publisher has a stock on hand which, in its judgment, could not be sold at usual terms in a reasonable time, it may sell such copies to any purchaser or purchasers, including Publisher's subsidiaries, at the best price it can secure. If such stock is sold at or below Publisher's cost, no royalty shall be paid to Author on such sales. If such copies are sold above Publisher's cost, the royalty paid to Author (in lieu of the royalty set forth in Paragraph 3 hereof) shall be ten per cent (10%) of the excesses obtained from such sales.

No royalty shall be paid on copies destroyed or on copies given away to promote the sales of the work, whether in regular promotional channels or to book sellers.

DISCONTINUANCE OF PUBLICATION

18. Publisher in its discretion may at any time determine to discontinue the publication of the work without prejudice to its rights hereunder. In that event, it shall give notice of such determination to Author by registered mail at the address last given by him. Within thirty days after the mailing of such notice Author shall have the right to purchase from Publisher at cost any existing sheet and bound stock which is the unrestricted property of Publisher. Upon such payment by Author the disposition of the other rights hereunder shall be by mutual agreement.

see Rider attached

COPIES OF SUB-AGREEMENTS

19. Publisher undertakes, upon request, to furnish to Author verified copies of any agreements which Publisher may make with any third party for the disposition of any rights in the work.

GOVERNMENTAL RESTRICTION

20. The performance of Publisher or of Author pursuant to this Agreement is subject to governmental restrictions on essential materials and supplies, acts of war, strikes, or other conditions beyond their control.

ccs ? W/C

Riders to Page 3 ..... E 4

an Untitled Novel by Gwen Davis

Rider to Paragraph 25.(a)

Author agrees to take/editorial/~~xxxxxxx~~ reasonable guidance from Publisher and shall reasonably comply with directions given so that the manuscript is satisfactory to Publisher in content and form.

an untitled novel by Gwen Davis

Discontinuance of Publication

27. The Publisher, one year after publication, may discontinue the publication of the work, in which event it shall give notice of such determination to the Author by registered mail at the address last given by him/her, or the book being out of print, as hereafter defined, for six months, the Author may give notice thereof to the Publisher. Within thirty days thereafter, the Author shall have the right to purchase from the Publisher, at cost, any existing sheets and bound stock and upon making such purchase all rights hereunder shall revert to the Author except such as the Publisher may have conveyed to third parties or with respect to which the Publisher may then be negotiating. If such sheets or bound stock exist and the Author shall not purchase the sheets and bound stock within said thirty days, then it is understood and agreed that this agreement shall continue in full force and effect for two years from the date of mailing of said notice, except that the Publisher shall be under no obligation to keep the work in print; and at the expiration of said two-year period, provided the Publisher meanwhile has not printed the work, or caused the same to be reprinted (in which event this agreement shall continue in full force and effect), the Publisher will discuss with the Author a further continuance of this agreement and, in the event no satisfactory arrangement can be made, will reconvey to the Author all the rights granted hereunder except such rights as may have been granted to third parties. If there are no sheets or bound stock in existence the Author shall negotiate with the Publisher for a further continuance of this agreement.

The work shall not be considered out of print so long as it is on sale in a cheap edition or in any other edition in the United States of America, or if there shall be in existence a contract for the publication of a cheap edition.

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BANKRUPTCY

30. In case of bankruptcy, receivership, or assignment for benefit of creditors of Publisher, the right of publication shall revert to Author and thereupon this Agreement shall terminate but Author shall have the right to buy back any remaining copies or sheets at a fair market value, to be determined by agreement.

PLACE OF EXECUTION

31. Regardless of the place of its actual execution, delivery, and performance, this Agreement shall be treated as though executed within the State of New York, and shall be governed by the laws and statutes thereof.

TERMS AND ASSIGN

32. This Agreement shall be binding upon and shall inure to the benefit of the heirs, executors, or administrators of Author and any successor in business of Publisher, but neither party shall otherwise separately sell or assign his or its interests in this Agreement without the written consent of the other. In the event of any such assignment by Publisher, Author shall nevertheless remain liable to Publisher (as well as to the assignee) on such of his obligations under Paragraphs 24, 25, and 29 of this Agreement.

OPTION

33. Author hereby agrees that Publisher shall have the first option to publish Author's next full-length book, but in no case shall Publisher be required to exercise this option within three months following publication of the work which is the subject of this Agreement.

WHEN EFFECTIVE

34. This Agreement shall not be binding upon either Publisher or Author unless it is signed by both parties and delivered to Publisher within a period of two months from the date of the Agreement.

WHOLE AGREEMENT

35. This Agreement contains the whole understanding of the parties, supersedes all previous oral or written representations or agreements, and may not be changed, modified, or discharged orally. Any modification, change, or discharge of this Agreement must be in writing and signed by Publisher.

36. The Author hereby employs and designates Robert Lantz-Candida Donadio Literary Agency, Inc., 111 West 57th Street, New York, N.Y., as her sole and exclusive agent with respect to the work as Untitled Novel and does hereby authorize and direct the Publisher to pay and the Publisher agrees to pay, all monies due or to become due to the Author hereunder to and in the name of said agent. The Author agrees to accept the receipt of the said agent as full evidence and satisfaction of said payments. In return for services rendered by the agent in connection with this agreement and for other services to be rendered, the Author agrees to pay and does hereby authorize the said agent to receive and retain ten per cent (10%) of all the gross monies payable hereunder. [illegible] It is understood that the agency hereunder and the agent's rights to receive and retain the sums aforementioned are irrevocable.

Witness to signature of Author-Proprietor

Bernice D. Lasper

AUTHOR-PROPRIETOR

Gwen Davis

Witness to signature of Publisher

Peter W. Murphy

DOUBLEDAY & COMPANY, INC.

[signature]

Author-Proprietor to supply the following

079-76-3847 or _____

Social Security Number — Tax Identification Number

Notice: If Author is not a United States resident please complete the attached tax forms and return them with the signed contract in lieu of supplying the above information.

RECEIVED
JAN 8 1970
ROYALTY DEPT.

[signature]

ACKNOWLEDGED FEB 3 1970

Exhibit 2 E 6

THE NEW AMERICAN LIBRARY, INC.

AGREEMENT made Aug. 20, 19 70 between THE NEW AMERICAN LIBRARY, INC. of 1301 Avenue of the Americas, New York, N. Y. 10019, hereinafter called "NAL" and

Seller DOUBLEDAY & COMPANY, INC. of 277 Park Avenue, New York, New York 10017 hereinafter called "the Seller",

WITNESSETH:

1. The Seller grants to NAL an exclusive license to print, publish and sell or to cause to be printed, published and sold softcover reprint editions in English, of

Book TOUCHING by Gwen Davis

hereinafter called "the Book".

2. The license herein granted shall be exclusive throughout the United States its territories and possessions, the Philippine Republic, and Canada and shall be non-exclusive throughout the rest of the world with the exception of the British Commonwealth of Nations (excluding Canada) as presently constituted.

Territory

The Seller agrees not to license any other English language edition in the open market except to a British publisher, as a part of the grant of regular British Commonwealth rights.

3. The Seller agrees that during the term of this agreement it will not, without the prior written consent of NAL, publish or sell or permit to be published or sold by any other party other than NAL any softcover edition of said Book. ~~which will be either directly or in~~ directly competitive with NAL's including by way of example only, a single softcover volume or in a softcover anthology, nor will it publish ~~or sell or~~ permit to be published or sold in softcover book form any ~~abridgment or~~ condensation or adaptation or selection therefrom of the Book or a play bearing a like title or a screenplay or novelized version of a screenplay ~~which is under control of the Seller.~~

Other Reprints

4. NAL shall publish the Book not earlier than one (1) year / from Seller's first publication date / nor later than two years (2) / provided, however, that NAL may first publish the Book earlier than herein specified so that first publication may be in approximate conjunction with the United States release of a motion picture based on the Book. ~~NAL may distribute its edition in the open market earlier than herein specified if a British softcover edition is impending as published at such earlier date.~~

Publication Date

INITIAL

WSA

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Term of Agreement

5. The license herein granted shall be effective for a period of five (5) years from NAL's publication date and shall thereafter be automatically extended until NAL receives from the Seller by registered mail written notice of termination. After receipt of such notice NAL may liquidate any existing stock, but shall not make any further printings of the Book except that it may (a) complete production of any printing on which it may have commenced work and incurred expense, and (b) liquidate the stock resulting from such printing, together with any existing stock of copies of the Book.

5.(a) In the event a motion picture is released during the five year term of license which does not allow NAL at least two years of sales distribution from such date of release, the license shall be extended to permit NAL a full two years of sale.

Seller's Warranties

6. The Seller warrants (a) that the rights herein granted to NAL are owned by the Seller and are not subject to any prior contract or lien which may interfere with the rights of NAL hereunder; (b) that the Book does not infringe upon any statutory or other copyright or any right of others whatsoever; (c) that the Book contains no matter which is contrary to law. The Seller will hold NAL harmless against any loss or expense, including counsel fees incurred, arising out of any breach or alleged breach of any of the foregoing warranties. In defending against any claim based on such breach or alleged breach, Seller shall have the right to select counsel.

Advance

7. NAL shall pay to the Seller the sum of One Hundred Thirty-Five Thousand Dollars ($ 135,000.00) payable as follows:

$45,000.00 upon Seller's hardcover publication date;
$45,000.00 upon NAL's publication date; and
$45,000.00 six (6) months after NAL's publication date

to be applied against the royalties specified below.

Royalties

(a) On copies sold in the United States and the territories under its administration except as provided in paragraph 7 (b), ten percent / of the U.S. cover price per copy /(10%)

(b) On net copies sold by NAL outside the United States and territories under its administration or within the United States for export, or at a price lower than the lowest regular wholesale price through special arrangements with book clubs, charitable, fraternal, professional, business or similar organizations, a royalty of four percent (4%) of the United States retail list price per copy. On copies sold direct to the consumer through the medium of mail-order coupon advertising, direct-by-mail circulation or premium sales, a royalty of five percent (5%) of the amount which NAL receives.

(c) ~~On non-mass market softcover editions (priced at not less than $1.0?) published by~~ NAL, a royalty of six percent (6%) of the United States retail price per copy on ~~the first 10,000 net copies sold and seven and one-half percent (7½%) thereafter.~~

INITIAL

(d) If in the opinion of NAL, the Book shall have ceased to have a remunerative sale, or should NAL find itself with overstock or a stock of damaged copies of the Book, NAL shall be at liberty to dispose of all or part of the existing stock at the best price it can secure and will pay the Seller a royalty of ten percent (10%) of the net amount received from the sale thereof in excess of the manufacturing cost thereof.

(e) No royalties shall be payable on copies destroyed, given away or sold at or below cost.

(f) NAL shall pay an additional advance of $15,000 to be applied against royalties specified in this paragragh 7, in the event of and upon the general release in the United States of a major motion picture based on the Book (~~i.e. a motion picture with a budget of at least $2,000,000~~) while this agreement is still in effect.

Royalties are payable on net sales only, less a reasonable reserve for returns and if royalties in excess of the advance guarantee have been paid on copies which may thereafter be returned, NAL shall have the right to deduct said royalties so paid from earned royalties thereafter payable to the Seller under this agreement ~~or any other agreement between the parties hereto pertaining to the works of the author of the Book. In the event there are no such future payments due at the time of the next accounting, Seller will promptly return the over-payments~~

Accounting

8. NAL shall render statements and make payments to the Seller as follows:

Statements rendered and Payments Made	*For the Period*
September 30	January 1 - June 30
March 31	July 1 - December 31

Delay in Publication

9. If NAL shall fail to publish the Book within the time provided in paragraph 4, the Seller may terminate this agreement by notice in writing and sent by registered mail, which shall become effective six (6) months after receipt thereof by NAL unless the Book is published before the expiration of that period. Upon such termination all rights granted hereunder shall revert to the Seller and except as hereinafter provided the only damages recoverable by the Seller, for failure of NAL to publish, if any, shall be limited to and shall not exceed the advance of $135,000 specified in paragraph 7 paid by NAL and that no damages, action or proceedings, legal or equitable, will be claimed, instituted or maintained by the Seller against NAL.

INITIAL

Should such failure of NAL to publish the Book as hereinbefore provided be the result of strikes, fires, shortages of labor or material, mechanical difficulties, governmental restrictions, the breakdown of market distribution facilities or any other circumstances beyond its control, whether similar or dissimilar to those enumerated, notice of termination shall be effective only after NAL shall have continued its failure to publish for a period of three (3) months after the termination of the situation which prevented compliance with the Seller's demand.

Exhaustion of Edition

10. If ~~after the expiration of three (3) years from NAL's publication date~~ NAL's edition of the Book goes out of print and if NAL fails or refuses to reprint the Book within six (6) months after receipt of a written demand from the Seller, the Seller may terminate this agreement by written notice. Except as hereinafter provided, such notice shall become effective thirty (30) days after receipt thereof by NAL. Upon such termination, all rights granted hereunder, except the right to dispose of existing stock, shall revert to the Seller and NAL shall be under no further obligation or liability to the Seller except that all royalties including advances, called for by this agreement shall be paid as they become due.

If NAL shall have been prevented from reprinting by strikes, fires, shortages of labor or material, mechanical difficulties, governmental restrictions, the breakdown of market distribution facilities or any other circumstances beyond its control, whether similar or dissimilar to those enumerated, notice of termination shall be effective only after NAL shall have continued its failure to reprint for a period of three (3) months after the termination of the situation which prevented compliance with the Seller's demand.

The Book shall not be deemed "out of print" within the meaning of this paragraph 10 as long as it is available for sale either from stock from NAL's warehouse or in the field.

Text for Reprint

11. The Seller shall furnish to NAL fifteen (15) copies of the trade edition of the Book, and NAL shall reprint the text of the Book faithfully. NAL shall print on the copyright page of each Book the copyright notice as contained in such trade edition, or such other copyright notice as may be supplied in writing by the Seller. The license herein granted also applies to any illustrations contained in the Seller's edition of the Book/ Upon request the Seller shall supply to NAL original artwork, glossy prints or other matter suitable for reproducing such illustrations in NAL's edition of the Book/ All references to artwork and illustrations herein include artwork and illustrations appearing on the dust jacket of Seller's edition of the Book/ /provided they are the property of the Seller, or available to the Seller.

12. In addition to the fifteen (15) copies that Seller shall give to NAL without charge as provided in paragraph 11, Seller agrees to sell NAL as many copies of its trade edition that NAL requests at Seller's manufacturing cost, exclusive of royalty, to be used for promotional purposes and not for resale. /if available

INITIAL

13. ~~Seller agrees that it will make available to NAL, without cost, typesetting tapes, or their equivalent, repro material or other mechanical material (excluding metal type) if such material by the Seller in setting type for the Book photographically or otherwise~~

Reprint of Other Titles

~~14. The Seller agrees to offer to NAL the exclusive rights to a softcover reprint~~ edition in English of the next work by the author of the Book which shall be at the disposal ~~of the Seller before offering such rights to any other publisher, directly or indirectly.~~

Law Applicable

15. This agreement shall be interpreted according to the laws of the State of New York, regardless of the place of its execution.

Arbitration

16. Any controversy arising out of or relating to this agreement, or the performance thereof, shall be determined by arbitration in New York City in accordance with the rules then obtaining of the American Arbitration Association and judgment on the award rendered may be entered in any court having jurisdiction thereof.

Parties Affected

17. This agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators or assigns of Seller, and upon the successors or assigns of NAL, but no assignment shall be binding on either of the parties without the written consent of the other. For the purposes of this agreement, reference to NAL shall include any assignee, subsidiary or successor of NAL by reason of merger, consolidation, sale or exchange of substantially all of the assets of NAL or other reorganization. No such merger, consolidation, sale or exchange of assets of NAL or other reorganization shall be deemed to be a breach of the provisions of this paragraph prohibiting assignment.

18. The foregoing warranties and indemnities are confined solely to the reproduction of the content and context of Seller's edition of the Book and shall under no circumstances apply to any claim, litigation or loss occasioned, influenced or contributed by any other material or treatment added by NAL.

SELLER'S PUBLICATION DATE: _____

THE NEW AMERICAN LIBRARY, INC.

Witness: _____

By _____
Herbert K. Schnall
Executive Vice President

DOUBLEDAY & COMPANY, INC.
Seller

Witness: _____

By _____
Title

19. NAL agrees to submit jacket design and all jacket copy for NAL's edition of the Book for approval of the Seller, said approval not to be unreasonably withheld.

Exhibit 3

E 11

LAW OFFICES
STANLEY FLEISHMAN
SUITE 718 MAX FACTOR BUILDING
6922 HOLLYWOOD BOULEVARD
HOLLYWOOD, CALIFORNIA 90028

ROBERT CARTER McDANIEL
PETER J. HARX
DAVID H. BROWN
JOHN H. WESTON

AREA CODE 213
TELEPHONE 466-6171

February 26, 1971

Mrs. Gwen Mitchell
9492 Rembert Lane
Beverly Hills, California 90210

Dear Mrs. Mitchell:

I am writing on behalf of my client, Paul Bindrim, a psychologist, duly licensed in the State of California. As you know, my client conducts nude encounter workshops, and has become prominent in connection with his work in this area. You attended one of these workshops on or about October 10 and 11, 1969, and signed an agreement in which you agreed, inter alia, that you would not "write articles, or in any manner disclose who has attended the workshop or what has transpired".

It has just come to my client's attention that, in violation of this agreement, you wrote a book that reveals what transpired at the workshop and what was said, although it does so in a distorted manner, placing my client in a false light, and injuring him personally and professionally. The book of course is entitled Touching, written under the name Gwen Davis, and published by Doubleday & Company, Inc.

You are also aware that the events transpiring at encounter workshops are confidential since those who attend often unveil their most private selves. Your book improperly invades those confidential relationships and violates the privacy of my client and of the participants of the workshop you attended. By using the unpublished words of my client and the others at the workshop, your book also violates my client's common-law copyright.

Additionally, it has come to my attention that you have been appearing on television and before the public holding yourself out as an authority on nude encounter workshops. From your said appearances, as well as from the book, it is unmistakable that the "Simon Herford" mentioned in your book refers to my client. In these appearances, you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops.

LAW OFFICES
STANLEY FLEISHMAN

In short, and without attempting at this point to be all inclusive, your book violates my client's legal rights by invading his privacy; by invading the privacy of a confidential relationship; by libeling him and defaming him personally and professionally; by violating his common-law copyright; and by breaching an express and implied contract.

On behalf of my client, demand is made upon you to take all necessary steps:

1. to cease all further publication and distribution of your said book;

2. to cease all attempts to sell film rights, paperback rights or any other rights in your book;

3. to cause all copies of your said book that are presently in distribution (in book stores, newsstands, etc.) to be withdrawn;

4. to cease defaming, slandering and libeling my client professionally or personally, as you have done in the past.

Additionally, of course, my client intends to seek damages from you, as allowed by law, for your wrongful conduct.

Very truly yours,

STANLEY FLEISHMAN

SF:eas

Exhibit 4 E 13

LAW OFFICES
STANLEY FLEISHMAN
SUITE 718 MAX FACTOR BUILDING
6922 HOLLYWOOD BOULEVARD
HOLLYWOOD, CALIFORNIA 90028

AREA CODE 213
TELEPHONE 466-6171

ROBERT CARTER McDANIEL
PETER J. HARX
DAVID H. BROWN
JOHN H. WESTON

Febduary 26, 1971

MAR 2 1971

Doubleday & Company, Inc.
Garden City, New York

Gentlemen:

I am writing on behalf of my client, Paul Bindrim, a psychologist, duly licensed in the State of California. For your information, I am enclosing a copy of my letter dated February 26, 1971, addressed to Mrs. Gwen Mitchell, the author of the book Touching published by you.

For the reasons stated in the said letter, demand is made upon you to take all necessary steps:

1. to cease all further publication and distribution of the said book;

2. to cease all attempts to sell film rights, paperback rights or any other rights in the said book;

3. to cause all copies of the said book that are presently in distribution (in book stores, newsstands, etc.) to be withdrawn.

Your failure to comply with this demand may subject you to exemplary damages for wilful wrongful conduct. Additionally, my client intends to seek damages from you, as allowed by law, for your wrongful conduct.

Very truly yours,

STANLEY FLEISHMAN

SF:ssb
encl.

Exhibit 5

E 14

DOUBLEDAY & COMPANY, INC. *Publishers*

877 PARK AVENUE, NEW YORK, N. Y. 10017 TEL: 212 TA 6-2000

March 8, 1971

Mr. Stanley Fleishman, Esq.
Max Factor Building - Suite 718
6922 Hollywood Boulevard
Hollywood, California 90028

Re: Gwen Davis Mitchell

Dear Mr. Fleishman:

I have received your letter of February 26, 1971 with a copy of the letter you sent to Gwen Davis Mitchell; reviewed both letters and your claims in your letter to Doubleday and discussed the situation with Mrs. Mitchell and her attorney, Anthony Liebig.

As a result of these conferences and reviewing I must deny any of the allegations set forth in both letters. I feel that there is no basis for any of the claims that you have made upon Doubleday.

Mrs. Mitchell has informed us that TOUCHING is a work of fiction and does not concern Mr. Bindrim or any persons present in the work shop to which you refer. Also, that she not only created the characters portrayed in TOUCHING, but also avoided any implication that any such characters were living persons.

Very truly yours,

Gerard H. Toner
Business Manager
Trade Publishing Division

GHT/lmf
cc: Ken McCormick
James McGrath
Anthony Liebig

Appendices

APPENDIX A

Order of the California Supreme Court

ORDER DENYING HEARING
after Judgment by the Court of Appeal
2d District, Division 4, Civil No. 52133

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

BINDRUM

v.

MITCHELL *et al.*

Appellants' petition for hearing DENIED.

Supreme Court
FILED
Jul 12 1979
G. E. BISHEL, Clerk
G E B
Deputy

/s/
Acting Chief Justice

APPENDIX B

Opinion of the Court of Appeal

Certified for Publication

IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

Division Four

2 Civ. No. 52133

(Super. Ct. No. WE C 24045)

PAUL BINDRIM,
Plaintiff, Respondent and Cross-Appellant,

v.

GWEN DAVIS MITCHELL, *et al.*,
Defendants, Appellants and Cross-Defendants.

Filed April 18, 1979.

APPEAL and CROSS-APPEAL from a judgment of the Superior Court, Los Angeles County. Richard L. Wells, Judge.

Appendix B

Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, for Defendant, Appellant and Cross-Defendant Mitchell.

Satterlee & Stephens, Robert M. Callagy, Katherine J. Trager, Lillick, McHose & Charles, Anthony Liebig and Kathleen Hallberg, for Defendant, Appellant and Cross-Defendant Doubleday.

Slaff, Mosk & Rudman, George Slaff and Marc R. Stein, for Plaintiff, Respondent and Cross-Appellant.

This is an appeal taken by Doubleday and Gwen Davis Mitchell from a judgment for damages in favor of plaintiff-respondent Paul Bindrim, Ph.D. The jury returned verdicts on the libel counts against Doubleday and Mitchell and on the contract count against Mitchell.

The court denied defendants' motion for judgment NOV and granted a new trial subject to the condition that new trial would be denied if plaintiff would consent to (1) a reduction of the libel verdict against Mitchell from $38,000 to $25,000; (2) a striking of the $25,000 punitive damage award against Doubleday on the libel count; and (3) a striking of the $12,000 damage award on the contract count against Mitchell.

Plaintiff consented without prejudice on these issues in any appeal to be taken from the judgment. Defendants appealed and plaintiff cross-appealed from the judgment reducing the orginal jury verdict.

Plaintiff is a licensed clinical psychologist and defendant is an author. Plaintiff used the so-called "Nude Marathon" in group therapy as a means of helping people to shed their psychological inhibitions with the removal of their clothes.

Appendix B

Defendant Mitchell had written a successful best seller in 1969 and had set out to write a novel about women of the leisure class. Mitchell attempted to register in plaintiff's nude therapy but he told her he would not permit her to do so if she was going to write about it in a novel. Plaintiff said she was attending the marathon solely for therapeutic reasons and had no intention of writing about the nude marathon. Plaintiff brought to Mitchell's attention paragraph B of the written contract which reads as follows:

> "The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants."

Mitchell reassured plaintiff again she would not write about the session, she paid her money and the next day she executed the agreement and attended the nude marathon.

Mitchell entered into a contract with Doubleday two months later and was to receive $150,000 advance royalties for her novel.

Mitchell met Eleanor Hoover for lunch and said she was worried because she had signed a contract and painted a devastating portrait of Bindrim.

Mitchell told Doubleday executive McCormick that she had attended a marathon session and it was quite a psychological jolt. The novel was published under the name "Touching" and it depicted a nude encounter session in Southern California led by "Dr. Simon Herford."

Plaintiff first saw the book after its publication and his attorneys sent letters to Doubleday and Mitchell. Nine

months later the New American Library published the book in paperback.

The parallel between the actual nude marathon sessions and the sessions in the book "Touching" was shown to the jury by means of the tape recordings Mitchell had taken of the actual sessions. Plaintiff complains in particular about a portrayed session in which he tried to encourage a minister to get his wife to attend the nude marathon. Plaintiff alleges he was libeled by the passage below:

Page 126-27 Excerpts from "Touching"

The minister was telling us how the experience had gotten him further back to God,

And all the time he was getting closer to God, he was being moved further away from his wife, who didn't understand, she didn't understand at all. She didn't realize what was coming out of the sensitivity training sessions he was conducting in the church.

. . . he felt, he more than felt, he knew, that if she didn't begin coming to the nude marathons and try to grasp what it was all about, the marriage would be over.

"You better bring her to the next marathon," Simon said.

"I've been trying," said the minister. "I only pray she comes."

"You better do better than pray," said Simon. "You better grab her by the cunt and drag her here."

"I can only try."

"You can do more than try, Alex. You can grab her by the cunt.

"A man with that kind of power, whether it comes from God or from his own manly strength, strength he

doesn't know he has, can drag his wife here by the fucking cunt.

"I know," Alex said softly. "I know."

Transcript of Actual Session

"I've come a little way,"

"I'd like to know about your wife. She hasn't been to a marathon?"

"No."

"Isn't interested? Has no needs?"

"I don't—she did finally say that she would like to go to a standard sensitivity training session somewhere. She would be—I can't imagine her in a nude marathon. She can't imagine it."

"Why?"

"Neither could I when I first came.

"Yeh. She might. I don't know."

"It certainly would be a good idea for two reasons: one, the minor one is that you are involved here, and if she were in the same thing, and you could come to some of the couple ones, it would be helpful to you. But more than that, almost a definite recipe for breaking up a marriage is for one person to go into growth groups and sense change and grow . . ."

"I know that."

"Boy they sure don't want that, and once they're clear they don't need that mate anymore, and they are not very patient."

"But it is true, the more I get open the more the walls are built between us. And it's becoming a fairly intelligent place, a fairly open place, doing moderate sensitivity eyeballing stuff with the kids. I use some of these techniques teaching out class work."

"Becoming more involved?"

"Yeh, involved at the same time that I am more separated from. It's a paradox again, isn't it?"

"Mmm."

Plaintiff asserts that he was libeled by the suggestion that he used obscene language which he did not in fact use. Plaintiff also alleges various other libels due to Mitchell's inaccurate portrayal of what actually happened at the marathon. Plaintiff alleges that he was injured in his profession and expert testimony was introduced showing that Mitchell's portrayal of plaintiff was injurious and that plaintiff was identified by certain colleagues as the character in the book, Simon Herford.

I

Defendants first allege that they were entitled to judgment on the ground that there was no showing of "actual malice" by defendants. As a public figure,[1] plaintiff is precluded from recovering damages for a defamatory falsehood relating to him, unless he proved that the statement was made with "actual malice," that is, that it was made with knowledge that it is false or with reckless disregard of whether it was false or not. (*New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 279-280.) The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 731.) Thus, what constitutes actual malice focuses on defendants' attitude toward the truth or falsity of the material published and reckless disregard of the truth or falsity cannot be fully encompassed by one infallible definition but its outer limits must

[1] Plaintiff admits, and the evidence shows, that he is a public figure.

be marked by a case-by-case adjudication. (*Widener* v. *Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 434.)

Evidence establishing a reckless disregard for the truth must be clear and convincing evidence, and proof by a preponderance of evidence is insufficient. (*New York Times Co.* v. *Sullivan* (1964) *supra,* 376 U.S. 254, at pp. 285-286.) Whether or not there was such malice is a question of fact to be determined by the trier of fact. (*Widener* v. *Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415.) However, the reviewing court is required to review the evidence in a libel action by a public figure, to be sure that the principles were constitutionally applied. (*Montandon* v. *Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938, 948.) The court has the duty to examine the record to determine whether it could constitutionally support a judgment in favor of plaintiff, but this does not involve a de novo review of the proceedings below wherein the jury's verdict is entitled to no weight. (*Widener* v. *Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d at p. 433.)

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and that defendant Doubleday had actual malice when it permitted the paperback printing of "Touching," although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter.[2] Since she attended sessions and had transcripts

[2] The fact that "Touching" was a novel does not necessarily insulate Mitchell from liability for libel, if all the elements of libel are otherwise present.

of actual conversations between plaintiff and the participants, there can be no suggestion that she did not know the true facts. Since "actual malice" concentrates solely on defendants' attitude toward the truth of falsity of the material published (*Carson* v. *Allied News Co.* (1976) 529 F.2d 206; *Widener* v. *Pacific Gas & Electric Co.* (1977), *supra,* 75 Cal.App.3d 415, and not on malicious motives,[3] certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

However, plaintiff failed to prove by clear and convincing evidence that the original hardback publication by Doubleday was made with knowledge of falsity or in reckless disregard of falsity. McCormick of Doubleday cautioned plaintiff that the characters must be totally fictitious and Mitchell assured McCormick that the characters in "Touching" were incapable of being identified as real persons. McCormick arranged to have the manuscript read by an editor knowledgeable in the field of libel. The cases are clear that reckless conduct is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication, (*St. Amant* v. *Thompson* (1968) *supra,* 390 U.S. 727, 731), and there is nothing to suggest that Doubleday entertained such doubts prior to the hardback publication.

Plaintiff suggests that, since the book did not involve "hot news," Doubleday had a duty to investigate the con-

[3] There is no suggestion that Mitchell was being malicious in the fabrication; her intent may have been to be colorful or dramatic.

tent for truth. Courts have required investigation as to truth or falsity of statements which were not hot news (*Widener* v. *Pacific Gas & Electric Co.* (1977) *supra,* 75 Cal.App.3d 415; *Carson* v. *Allied News Co.* (1976), *supra,* 529 F.2d 206), but those cases involved factual stories about actual people. In the case at bar, Doubleday had been assured by Mitchell that no actual, identifiable person was involved and that all the characters were fictitious in the novel. Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest innaccuracy, there is no duty to investigate. (See *Baldine* v. *Sharon Herald Co.* (1968) 391 F.2d 703, 707.) There was nothing in the record to suggest that, prior to the hardback printing defendant Doubleday in fact entertained serious doubts as to the truth or falsity of the publication, and investigatory failure alone are insufficient to find actual malice.

However, prior to the paperback printing there were surrounding circumstances to suggest inaccuracy, such that at that point Doubleday had a duty to investigate. Plaintiff did show that Doubleday sold the rights to the New American Library after receiving a letter from plaintiff's attorney explaining that plaintiff was Herford and the inscription in the paperback said, "This is an authorized edition published by Doubleday and Company." Although, after the receipt of the plaintiff's attorney's letter, Doubleday again inquired of Mitchell as to whether plaintiff was the character in the book, the jury was entitled to find that Mitchell's assurance to Doubleday was not sufficient to insulate Doubleday from liability and that Doubleday had some further duty to investigate. The jury could have inferred that at that point Doubleday either had seri-

ous doubts, or should have had serious doubts, as to the possibility that plaintiff was defamed by "Touching" and that at that point Doubleday had some duty to investigate.[4]

II

For similar reasons, the award for punitive damages against Doubleday may stand. A public figure in a defamation case may be awarded punitive damages when there is "actual malice" under the *New York Times* standard (*Maheu* v. *Hughes Tool Co.* (1977) 569 F.2d 459), and, as we have said above, actual malice was established for Doubleday. The jury below erroneously struck the award of punitive damages against Doubleday, on the ground that the jury did not award even token punitive damages against Mitchell although she had $165,000 in community property. The judge reasoned that the jury apparently found no fault or "malice attributable to her." However, the jury must have found that Mrs. Mitchell had "actual malice" to have awarded even compensatory damages against her. And the standard for punitive damages for libel of a public figure is "actual malice," under the *New York Times* case, not hatred. Since all that is required for punitive damages of a public figure is actual malice and not hatred (see *Maheu* v. *Hughes Tool Co., supra*), and since both Doubleday and Mitchell had "actual malice," it follows that punitive damages *could* have been awarded against both defendants. But since punitive damages are

[4] Note: This paperback edition was published by New American Library, not by Doubleday, but was apparently published with Doubleday's permission. The parties do not raise the issue of whether Doubleday's "permission," i.e., whether Doubleday's "causing" the book to be published by another company, is actually a "publication" for purposes of libel, by Doubleday.

discretionary and wealth may be taken into account (see *Sandoval* v. *Southern Cal. Enterprises, Inc.* (1950) 98 Cal. App.2d 240, 250), it was proper to award punitive damages only against one defendant, and not the other.

III

Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel "Touching."

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in "Touching" was described in the book as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms" and that Bindrim was clean shaven and had short hair. Defendants rely in part on *Wheeler* v. *Dell Publishing Co.* (1962) 300 F.2d 372, which involved an alleged libel caused by a fictional account of an actual murder trial. The *Wheeler* court said (at p. 376):

> "In our opinion, any reasonable person who read the book and was in a position to identify Hazel Wheeler with Janice Quill would more likely conclude that the author created the latter in an ugly way so that none would identify her with Hazel Wheeler. It is important to note that while the trial and locale might suggest Hazel Wheeler to those who knew the Chenoweth family, suggestion is not identification. In *Levey* [*Levey* v. *Warner Bros. Pictures* (S.D.N.Y. 1944) 57 F.Supp. 40] the court said those who had seen her act may have been reminded of her by songs and scenes, but would not reasonably identify her."

However, in *Wheeler* the court found that no one who knew the real widow could possibly identify her with the character in the novel. In the case at bar, the only differences between plaintiff and the Herford character in "Touching" were physical appearance and that Herford was a psychiatrist rather than psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say, as did the court in *Wheeler,* that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and defendant's own tape recordings of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks* v. *Curtis Publishing Co.* (1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In *Middlebrooks,* there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close parallel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and the plaintiff

Bindrim and those few differences do not bring the case under the rule of *Middlebrooks.* (See *Fetler* v. *Houghton Mifflin Co.* (1966) 364 F.2d 650.) There is overwhelming evidence that plaintiff and "Herford" were one.

IV

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in "Touching" were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact. (*Gregory* v. *McDonnell Douglas Corp.* (1976) 17 Cal.3d 596.)

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact. Plaintiff relies in part on the above quoted conversation between plaintiff and the minister as one libelous statement of fact. Plaintiff also argues that a particular incident in the book is libelous. That incident depicts an encounter group patient as so distressed upon leaving from the weekend therapy that she is killed when her car crashes. Plaintiff also complains of an incident in the book where he is depicted as "pressing," "clutching," and "ripping" a patient's cheeks and "stabbing against a pubic bone." Plaintiff complains, too, of being depicted as having said to a female patient, "Drop it, bitch." There are also other incidents alleged to be libelous.[5]

[5] We find it unnecessary to discuss each alleged libel separately, since if any of the alleged libels fulfill all the requirements of libel, that is sufficient to support the judgment.

Our inquiry then, is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: *i.e.,* substantially inaccurate description of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.

Defendants here rely on the cases which have considered the difference in published materials between factual statements and matters of mere opinion. While, as we discuss below, we do not feel that those cases necessarily express the rules applicable where, as here, the published material purports to state actual facts concerning the characters in a novel, we proceed, first, to examine the cases on which defendants rely.

Many cases discuss the difference between fact and opinion. The court in *Greenbelt Pub. Assn.* v. *Bresler* (1970) 398 U.S. 6, examined the use of the term "blackmail" in a controversy between the parties over zoning, and found that, although the use of that term in some circumstances could constitute libel, in the *Bresler* case the term was being used figuratively and did not connote actual commission of a crime.

In *Letter Carriers* v. *Austin* (1974) 418 U.S. 264, Jack London called someone a "scab," and defined the term with the phrase as a "traitor to his God, his country, his family and his class." (*Id.,* at p. 268.) Again, the *Austin* court held that the statements were used loosely and figuratively, and there was no libel in the use of the term "traitor." Thus, words that appear factual at first glance, such as "blackmail," and "traitor" may not be factual, depending on the context in which they were used, and whether they were used figuratively.

The courts have set guidelines in determining what is fact and what is opinion. One guideline is that an alleged defamatory statement may constitute a fact in one context and an opinion in another and content of the communication is taken as a whole. In certain settings fiery rhetoric and hyperbolic statements of fact may well assume the character of opinion. (*Gregory* v. *McDonnell Douglas Corp.* (1976) *supra,* 17 Cal.3d 596.) Where the statements are unambiguously fact or opinion, *Gregory* applies, and the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury. (*Good Government Group of Seal Beach, Inc.* v. *Superior Court* (1978) 22 Cal. 3d 672.)[6]

If viewed as a case involving an issue of "opinion," those cases, and other cases involving that issue, make it clear that, since there was evidence that people had identified plaintiff with the Dr. Herford of the book, the jury's finding against defendants is conclusive on that issue.

---

[6] Here, unlike the *Good Government* case, there is no actual "ambiguous" language in the novel. However, whether the literary incidents were understood by those readers who identified plaintiff with Herford as strictly fictional or as based on fact is similar to the question before the court in *"Good Government"* and the reasoning of that case applies.

However, as we have indicated above, we regard the case at bench as involving a different issue. Defendants contend that the fact that the book was labeled as being a "novel" bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual non-fictional person. That contention, thus broadly stated is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks* v. *Curtis Publishing Co.* (1969) *supra,* 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases, such as *Greenbelt Pub. Assn.* v. *Bressler* (1970), *supra,* 398 U.S. 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks* v. *Casablanca Records* (D.C. S.D.N.Y. 1978) ..... F.Supp. ....., a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known. We cannot make any similar determination here. Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for

the jury. Its verdict adverse to the defendants cannot be overturned by this court.

V

Defendants raise the question of whether there is "publication" for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. (*Brauer* v. *Globe Newspaper Co.* (1966) 217 N.E.2d 736, 739.) Therefore, irrelevant whether all readers realized plaintiff and Herford were identical.

VI

Appellant Doubleday alleges several charges to the jury were erroneous, and that the court improperly refused to give certain proffered instructions by them. Doubleday objects that the court erred when it rejected its instruction that Bindrim must prove by clear and convicting evidence that defendants intentionally identified Bindrim. Firstly, the "clear and convincing evidence" standard applies to the proving that the act was done with "actual malice" and an instruction to that effect was given by the court. Secondly, defendants' instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim, was properly refused. For the tort of defamation, publication to one other person is sufficient, *supra.*

Defendant objects that the court refused the following instruction:

"DEFENDANTS' REQUESTED INSTRUCTION NO. 8

"The following statements in "Touching," and no others, may be considered by you to be possibly libelous:

1. The statement at page ....., lines .....
_____
_____
_____
_____
_____
_____
_____
_____

"If you find that none of those statements libeled plaintiff, you must find for defendants."

Defendants argue that by the refusal of the above instruction the court failed to instruct the jury that it could only assess liability if it determined that the challenged statements were libelous. The court did instruct adequately in that area. The court instructed:

"DEFENDANTS' INSTRUCTION NO. 9

"In order to recover for libel, plaintiff must prove that a statement in the novel 'Touching' is reasonably susceptible of a libelous interpretation. In making this determination you should consider the novel as a whole and the context of said statement.

"In determining whether a statement is capable of a libelous meaning, you should construe the words according to the fair and natural meaning that will

be given them by reasonable persons of ordinary intelligence."

Defendant Doubleday claims confusion in the instruction on standard of proof. The instruction on clerk's transcript page 111 explained to the jury the additional burden of proof required for "actual malice."

Defendant alleges that the court failed to instruct the jury that the author and publisher should be considered separately for purposes of liability. However, the court did instruct the jury to consider each defendant separately and to decide each defendant's case separately.

Appellant Mitchell objects that the trial court erroneously allowed one of Bindrim's identification witnesses, Otto, to testify that a psychologist in 1971 or 1972 who was familiar with nudity and psychotherapy literature would be able to recognize Herford as Bindrim, and that someone who did not know Bindrim personally but was familiar with the literature would recognize Bindrim, citing only California Evidence Code section 800. First of all, defendant's objection to the lower court did not clearly state his ground of objection. Secondly, there was other evidence of identification by Hoover and by Hiller. And Otto also testified that he himself identified Bindrim as Herford because Bindrim had written about "peak experiences" and because of the character's style of talking to people. Therefore, defendant could not have been harmed by the above testimony.

Mitchell also objects that the court erroneously prohibited evidence that plaintiff once had sexual intercourse with a participant. This was irrelevant as to whether

plaintiff was libeled by other inaccurate portrayals of his language and his conduct.

Appellant Mitchell alleged that she and Doubleday were joint tortfeasors and any judgment against them had to be joint and several. Contributing wrongdoers, whether joint, concurrent or successive tortfeasors are ordinarily jointly and severally liable for the entire damage. (*Gray* v. *Sutherland* (1954) 124 Cal.App.2d 280.) When they are joined in an action it is improper to apportion compensating damage among them; judgment for the full amount should be rendered against each. (*Oldham* v. *Aetna Ins. Co.* (1936) 17 Cal.App.2d 144.) Courts have resolved inconsistencies by the determination of the jury's intention from an examination of the verdict. (*Snodgrass* v. *Hand* (1934) 220 Cal. 446.) The appellate court will, if possible, make its own correction to uphold the verdict. (*Woodcock* v. *Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457.) In the case at bar, the jury's intent was clear from their verdict, and this court will award plaintiff $50,000 as a joint and several award against both defendants, rather than the $25,000 against each of the two defendants as was awarded by the court. The defendant Doubleday is also liable in $25,000 punitive damages.

The Cross Appeal

Bindrim contends that the trial court erred in striking the damage award on the contract count. We are aware of no authority that a professional person can, by contract or otherwise, prevent one of his patients from reporting the treatment that patient received. Since the whole theory

of plaintiff's therapy was that of group encounter, what Mitchell saw done to and by other members of the group was part of her own treatment. She was free to report what went on. The limits to her right to report were those involved in the libel counts. Plaintiff has no separate cause of action for the mere reporting.

In addition, although plaintiff testified in broad language that he had been damaged by the publication of the book, it is not clear how much, if any, of that damage flowed from the inaccuracies in the book as distinguished from the fact that his encounter therapy had been given publicity. On this record, we cannot say that the trial court erred.

Finally, cross-appellant Bindrim argues that the reduction on the compensatory damage amount against Mitchell on the libel count should be restored. The judge reduced the verdict against Mitchell from $38,000 to $25,000 on the ground that there was no evidence that the publication of the libel to Mrs. Hoover caused any damage. We agree with the court's determination that Mrs. Hoover was fully aware of what actually happened at the session, and therefore that plaintiff could not have been damaged by any publication to her.

Cross-respondents argue that the compensatory damages should be reduced to a total of $25,000 against both defendants. Judge Wells entered a judgment in the sum of $50,000, by charging each defendant $25,000. The jury's verdict should be reconciled when possible. (*Maheu* v. *Hughes Tool Co.* (1977), *supra,* 569 F.2d 459.) Insofar as the defendants are jointly and severally liable as joint or

successive tortfeasors, we enter a $50,000 compensatory damage verdict against both defendants, for which they are jointly or severally liable.

Plaintiff's cross-appeal on the issue of punitive damages is well taken and the $25,000 award of punitive damages by the jury against Doubleday should stand. The jury had discretion not to award punitive damages against one of the defendants, since as we have said before, the greater wealth of one defendant is relevant.

The judgment, as modified on the motion for a new trial, is further modified as follows:

(1) By substituting for separate judgments against defendants Mitchell and Doubleday a joint and several judgment against both of said defendants in the amount of $50,000; and

(2) By including in said judgment a separate judgment against Doubleday of $25,000 for punitive damages.

Otherwise the judgment is affirmed. Neither party shall recover costs on appeal.

CERTIFIED FOR PUBLICATION

Kingsley, *J.*

Jefferson (Bernard), *J.*

Although I agree with the majority opinion authored by Justice Kingsley, I am writing a separate concurring opinion in order to comment upon the dissenting opinion. The dissent erroneously describes the majority holding as

creating a cause of action for libel out of a work of fiction that attacks the techniques of "nude encounter therapy." Because of this misconception with respect to the majority's holding, the dissent reaches the conclusion that the majority's view "poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value."

Had the defendant author of the work of fiction limited her novel to a truthful or fictional description of the techniques employed in nude encounter therapy, I would agree with the dissent that plaintiff had no cause of action for defamation. But here we have a description of a therapist as using insulting and vulgar language of the rankest sort in addressing his patients. Apparently the dissent does not consider that such language is capable of being considered defamatory of plaintiff in his professional role of a therapist practicing nude encounter therapy. The vulgarity purportedly used by the therapist in the novel would necessarily be considered by numerous persons as completely unprofessional and defamatory if used by a professional therapist such as the plaintiff. I fail to see how any jury or any court could consider such crude vulgarity as *not* defaming a professional therapist to whom such vulgarity was attributed in the practice of his profession. I need not repeat this language here as it is set forth in the majority opinion.

" 'The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or *with respect to his occupation.*' "

(*MacLeod* v. *Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.) (Emphasis added.)

The dissent concludes that the "average reader" would not have considered plaintiff defamed as a professional therapist who used the crude and vulgar language. But the dissent does not tell us what constitutes an "average reader." I assume that novels are read by the learned, the not so learned, and persons in all walks of life. It is my view that any reader of the novel, whether familiar with a professional therapist's practices or not, might well conclude that a therapist described in the novel was a lewd and dissolute character in the practice of his profession. As indicated in *MacLeod,* a "publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." (*MacLeod, supra,* 52 Cal.2d 536, 547.)

The case at bench is not like that of *Greenbelt Pub. Assn.* v. *Bresler* (1970) 398 U.S. 6, 14, in which the court emphasized that "*[n]o reader*" could have thought that a newspaper which reported words of speakers were charging a developer with the commission of a crime in using the phrase "blackmail," and that, on the contrary, "*even the most careless reader* must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet . . . ." (*Id.* at p. 14.) (Emphasis added.) The *Greenbelt* court seems to place all readers—careful and careless alike—as average readers.

The dissent finds error in the instruction given the jury on the issue of identification. The use of the word "reasoning" in the instruction dissipates the dissent's view that only one person was required to understand the defamatory meaning. If one person "reasonably" understood the defamatory character of the language used, it describes what readers generally would "reasonably" understand. I see no basis for the dissent's view that the instruction had the result of mulcting defendants for the exercise of their first amendment right to comment on the nude marathon. The first amendment right to comment does *not* include the right to commit libel.

The dissent sees in the majority opinion a branding of a novel as libelous because it is critical of an occupational practice. This is a distortion of the majority's position. The position of the majority is simply to refuse to permit a writer and publisher to libel a person and hide under the banner of having written only fictional material. "Of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff. 'Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction or in jest.' " (*Middlebrooks* v. *Curtis Publishing Company* (1969) 413 F.2d 141, 143.)

Jefferson (Bernard), *J.*

Files, *P.J.* (dissenting)

This novel, which is presented to its readers as a work of fiction, contains a portrayal of nude encounter therapy, and its tragic effect upon an apparently happy and well-adjusted woman who subjected herself to it. Plaintiff is a practitioner of this kind of therapy. His grievance, as

described in his testimony and in his briefs on appeal, is provoked by that institutional criticism[1] Plaintiff's "concession" that he is a public figure appears to be a tactic to enhance his argument that any unflattering portrayal of this kind of therapy defames him.

The decision of the majority upholding a substantial award of damages against the author and publisher poses a grave threat to any future work of fiction which explores the effect of techniques claimed to have curative value.

The majority opinion rests upon a number of misconceptions of the record and the law of libel. I mention a few of them.

Defamation.

Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided or which has a tendency to injure him in his reputation. (Civ. Code, § 45.) A libel which is defamatory without the necessity of explanatory matter is said to be a libel on its face. Language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a result thereof. (Civ. Code, § 45a.)

[1] The record demonstrates the essential truth of the author's thesis. A tape recording of an actual encounter session conducted by plaintiff contains this admonition to the departing patients:

> ". . . Now, to top that off, you're turned on, that is you're about as turned on as if you've had 50 or 75 gammas of LSD. That's the estimate of the degree of the turn-on is. And it doesn't feel that way, because you're [*sic*] been getting higher a little bit at a time. So don't wait to find out, take my word for it, and drive like you've had three or four martinis. Drive cautiously."

Whether or not matter is on its face reasonably susceptible of a libelous meaning is a question of law. (*McLeod* v. *Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.)

The complaint in this action quotes verbatim the portions of the defendant's novel which are alleged to be libelous. No explanatory matter or special damages are alleged. The only arguably defamatory matter I can find in that complaint is in the passages which portray the fictional thrapist using coarse, vulgar and insulting language in addressing his patients. Some of the therapeutic techniques described in the quoted passages may seem bizarre, but a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him. The alleged defamation therefore is limited to the imputation of vulgar speech and insulting manners.

The defendants asked the trial court to give an instruction to the jury identifying the matter which it could consider as defamatory. The trial court refused. Instead, the court sent the case to the jury without distinction between actionable defamation and constitutionally protected criticism. In addition, the trial court's instructions authorized the jury to award special damages for loss of income which could have resulted from the lawful expression of opinion.

Identification.

Whether or not an allegedly defamatory communication was made "of and concerning the plaintiff" is an issue involving constitutional rights. (*New York Times* v. *Sullivan* (1964) 376 U.S. 254, 288; see Rest. Torts, 2d, § 580A Com.

(g).) Criticism of an institution, profession or technique is protected by the First Amendment; and such criticism may not be suppressed merely because it may reflect adversely upon someone who cherishes the institution or is a part of it.

Defendants' novel describes a fictitious therapist who is conspicuously different from plaintiff in name, physical appearance, age, personality and profession.

Indeed the fictitious Dr. Herford has none of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy. Only three witnesses, other than plaintiff himself, testified that they "recognized" plaintiff as the fictitious Dr. Herford. All three of those witnesses had participated in or observed one of plaintiff's nude marathons. The only characteristic mentioned by any of the three witnesses as identifying plaintiff was the therapy practiced.

Plaintiff was cross-examined in detail about what he saw that identified him in the novel. Every answer he gave on this subject referred to how the fictitious Dr. Herford dealt with his patients. (See Appendix C to Opening Brief of Mitchell.)

Plaintiff has no monopoly upon the encounter therapy which he calls "nude marathon." Witnesses testified without contradiction that other professionals use something of this kind. There does not appear to be any reason why anyone could not conduct a "marathon" using the style if not the full substance of plaintiff's practices.

Plaintiff's brief discusses the therapeutic practices of the fictitious Dr. Herford in two categories: Those prac-

tices which are similar to plaintiff's technique are classified as identifying. Those which are unlike plaintiff's are called libelous because they are false. Plaintiff has thus resurrected the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times* v. *Sullivan, supra,* 376 U.S. 254. Kalven wrote: "There is revealed a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. . . ." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 The Supreme Court Review 191, 199.

Even if we accept the plaintiff's thesis that criticism of nude encounter therapy may be interpreted as libel of one practitioner, the evidence does not support a finding in favor of plaintiff.

Whether or not a publication to the general public is defamatory is "whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory." (*Patton* v. *Royal Industries, Inc.* (1968) 263 Cal.App.2d 760, 765. See *Good Government Group of Seal Beach, Inc.* v. *Superior Court* (1978) 22 Cal. 3d 672, 682; Rest. Torts, 2d, § 559, comment (e).)

The majority opinion contains this juxtaposition of ideas: "Secondly, defendants' [proposed] instructions that the jury must find that a substantial segment of the public did, in fact, believe that Dr. Simon Herford was, in fact, Paul Bindrim (CT 173, 171,) was properly refused.

For the tort of defamation, publication to one other person is sufficient, *supra.*"

The first sentence refers to the question whether the publication was defamatory of plaintiff. The second refers to whether the defamatory matter was published. The former is an issue in this case. The latter is not. Of course, a publication to one person may constitute actionable libel. But this has no bearing on the principle that the allegedly libelous effect of a publication to the public generally is to be tested by the impression made on the average reader.

The jury instruction on identification.

The only instruction given the jury on the issue of identification stated that plaintiff had the burden of proving "That a third person read the statement and reasonably understood the defamatory meaning and that the statement applied to plaintiff."

That instruction was erroneous and prejudicial in that it only required proof that one "third person" understood the defamatory meaning.

The word "applied" was most unfortunate in the context of this instruction. The novel was about nude encounter therapy. Plaintiff practiced nude encounter therapy. Of course the novel "applied to plaintiff," particularly insofar as it exposed what may result from such therapy. This instruction invited the jury to adopt plaintiff's basis contention that "whoever attacks nude encounter therapy wounds me." The effect is to mulct the defendants for the exercise of their first amendment right to comment on the nude marathon.

Malice.

The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.

As the majority agrees, a public figure may not recover damages for libel unless "actual malice" is shown. Sufficiency of the evidence on this issue is another constitutional issue. (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm plaintiff. No purpose for wanting to harm him has been suggested.

The majority opinion seems to say malice is proved by Doubleday's continuing to publish the novel after receiving a letter from an attorney (not plaintiff's present attorney) which demanded that Doubleday discontinue publication "for the reasons stated in" a letter addressed to Gwen Davis. An examination of the latter demonstrates the fallacy of that inference.

The letter to Davis [Mitchell] asserted that the book violated a confidential relationship, invaded plaintiff's privacy, libelled him and violated a "common law copyright" by "using the unpublished words" of plaintiff. It added "From your said [television] appearances, as well

as from the book, it is unmistakable that the 'Simon Hereford' mentioned in your book refers to my client."

The letters did not assert that any statement of purported fact in the book was false. The only allegation of falsity was this:

> "In these [television] appearances you stated, directly or indirectly, that nude encounter workshops, similar to the one you attended, are harmful. The truth is that those attending my client's workshops derive substantial benefit from their attendance at such workshops."

These letters gave Doubleday no factual information which would indicate that the book libelled plaintiff.

The letters did not put Doubleday on notice of anything except that plaintiff was distressed by the expression of an opinion unfavorable to nude encounter therapy—an expression protected by the First Amendment. (See *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 339; *Gregory* v. *McDonnel Douglas Corp.* (1976) 17 Cal.3d 596, 600.)

From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."

I would reverse the judgment.

Files, *P. J.*

Orders Modifying Opinions and Order Denying Rehearing

Certified for Publication

IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

Division Four

2 Civ. No. 52133

(Super. Ct. No. WE C 24045)

PAUL BINDRIM,
Plaintiff, Respondent and Cross-Appellant,

v.

GWEN DAVIS MITCHELL,
Defendants, Appellants and Cross-Defendants.

Filed: May 7, 1979.

Good cause appearing:

(1) The opinion of Mr. Justice Kingsley in the above entitled case, filed on April 18, 1979, is hereby modified as follows:

Appendix B

(a) On page 4 of the Xerox opinion, in the third line of the fourth paragraph on said page, delete the word "Mitchell" and substitute the word "Bindrim";

(b) On page 8 of said Xerox opinion, in the fourth to sixth lines of the second full paragraph on said page, delete the words "and had transcripts of actual conversations between plaintiff and the participants";

(c) On page 12 of said opinion, in the fifth line on said page, delete the word "jury" and substitute the words "trial court";

(d) On page 14 of said opinion, in the sixth line from the bottom on said page, delete the word "defendant's" and substitute the word "plaintiff's";

(e) On page 21 of said opinion, in the third line from the bottom on said page, delete the word "convicting" and substitute the word "convincing."

(2) In the opinion of Mr. Justice Jefferson, filed on said date, on page 31 of said opinion, in the second line from bottom, delete the word "reasoning" and substitute the word "reasonably."

(3) The petition for rehearing, and the supplement to said petition, filed by defendants and appellants, is hereby denied.

Kingsley, *J.*; Jefferson (Bernard), *J.*

Appendix B

(1) I would grant a rehearing.

(2) My dissenting opinion is hereby modified by deleting the sentence which commences in the next to the last line on page 38 of said opinion and substituting the following: "This instruction invited the jury to find that plaintiff was libeled by criticism of the kind of therapy he practiced."

Files, *P. J.*

APPENDIX C

Order of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NO. WEC 24045

PAUL BINDRIM,

Plaintiff,

vs.

GWEN MITCHELL, etc., *et al.*,

Defendants.

The above entitled matters having been submitted for decision on March 23, 1977, Defendants' motion for judgment notwithstanding the verdict is hereby denied.

Pursuant to the Stipulation re Revised Memorandum of Costs, filed March 9, 1977, the Court finds that the correct amount of prejudgment costs and disbursements recoverable by Plaintiff is in the sum of $2,468.71.

Defendants' motion for new trial is granted on the grounds of excessive damages and insufficiency of the evidence to justify the verdicts. After weighing the evidence, the Court is convinced from the entire record, including reasonable inference therefrom, that the jury should have reached different verdicts. This order granting a new trial is subject to the condition that the motion of Defendant

MITCHELL for new trial is denied if within ten (10) days Plaintiff files a written consent to a reduction in the verdicts against said Defendant in the amount of $13,000 on the cause of action for libel and $12,000 on the cause of action for breach of contracts, and in the judgment against Defendant MITCHELL from $50,000 to $25,000, which amounts the Court, in its independent judgment, determines from the evidence to be fair and reasonable.

The motion of Defendant DOUBLEDAY for a new trial is granted, subject to the condition that the motion is denied if within ten (10) days Plaintiff files a written consent to a reduction in said verdict in the amount of $25,000, consisting of the jury's award of punitive damages, and a reduction in the total judgment against Defendant DOUBLEDAY from $50,000 to $25,000, which reduction the Court, in its independent judgment, determines from the evidence to be fair and reasonable.

On the causes of action for libel, the evidence does not support a different verdict for compensatory damages against the two defendants. All of the evidence of compensatory damages related to damages caused by the publication of "Touching" by Defendant DOUBLEDAY. There was no evidence of any such damages caused by Defendant MITCHELL's showing the manuscript to Mrs. Hoover. Under the instructions, therefore, the jury could not properly find different compensatory damages against the two defendants on this cause of action. Since the compensatory damages of $25,000 found against Defendant DOUBLEDAY would necessarily apply to Defendant MITCHELL, a reduction to this amount against Defendant MITCHELL is supported by the evidence.

Nor does the evidence support the award of punitive damages against the Defendant DOUBLEDAY. The only possible evidence on which the jury could award the $25,000 punitive damages against DOUBLEDAY, and none against MRS. MITCHELL, would be that DOUBLEDAY's fault and wealth were greater. But the evidence does not support a finding that DOUBLEDAY's fault was greater; it was slight, compared to MRS. MITCHELL's. The only evidence of DOUBLEDAY's fault or recklessness which would support an award of punitive damages was the testimony of KENNETH MCCORMICK, who was the book's editor at DOUBLEDAY. The extent of his knowledge was that MRS. MITCHELL had attended an encounter session in Southern California, although MRS. MITCHELL advised him that the book was not based on any actual person. No one at DOUBLEDAY made any attempt to discover Plaintiff's or SIMON HEREFORD's identity, or contact him or check the book with him. This is insufficient evidence for the jury to find "oppression, fraud or malice" as required by Plaintiff's Jury Instruction No. 1; or to find that MCCORMICK acted "in reckless disregard of [the possible] result" of the book's publication. Especially is this true in view of the fact that the jury found MRS. MITCHELL, the author, *not* liable for any punitive damages. Since the jury did not even award *token* punitive damages against MRS. MITCHELL, who had wealth of $165,000 in community property, it apparently found no fault or malice attributable to her. The mere fact that the evidence showed DOUBLEDAY's great wealth does not support the $25,000 punitive damage award against it.

Finally, there is no evidence to support an award against Defendant MRS. MITCHELL on the cause of action for breach

of contract. This cause of action was based on paragraph 13 of Exhibit 33, wherein MRS. MITCHELL promised that she would not "write articles, or in any manner disclose who has attended the workshop or what has transpired". Although there was ample evidence that MRS. MITCHELL breached this promise, there is no evidence that such breach caused any damages to Plaintiff. Plaintiff's only evidence of damages were that Plaintiff's reputation was damaged and he lost business and was made ill because of the libels, i.e., the *untruths,* in the book, rather than the truths. There was no evidence that the book's disclosure of who attended or what actually transpired damaged Plaintiff in any way.

DATED: MAR. 29 1977

/s/ RICHARD L. WELLS

RICHARD L. WELLS
Judge of the Superior Court

APPENDIX D

Constitutional Provisions and Statutes Involved

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law.

Subdivisions 2 and 4 of Section 48a of the California Civil Code provide in pertinent part:

> [N]o exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.
>
> * * *
>
> "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

Supreme Court, U. S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,
Petitioner,

v.

PAUL BINDRIM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Doubleday & Company, Inc.

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November 19, 1979

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,

Petitioner,

v.

PAUL BINDRIM,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 24 of the Rules of this Court, Doubleday & Company, Inc. ("Doubleday") replies to respondent's Brief in Opposition to Doubleday's Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Respondent's Brief does not comply with Rules 24 and 19 of the Rules of this Court in that it does not present any reasons why a Writ of Certiorari should be denied. Indeed, respondent does not challenge the significance of the ques-

tions raised in Doubleday's Petition but surprisingly highlights the constitutional importance and wide-ranging effects of the issues presented in this case.[1]

Notwithstanding respondent's gross misstatements and mischaracterizations of the record below, it is plain upon review of Doubleday's Petition and respondent's Brief in Opposition that the treatment accorded publishers' established First Amendment protections by the courts below necessitates a careful review and reversal of the ominous intrusions permitted by the California courts so as to prevent the decisions below from having a truly catastrophic effect upon essential freedoms of press.

Despite respondent's agreement that clear constitutional questions are present in this case, respondent, in his Brief in Opposition, includes several egregiously misleading statements which must be addressed in this reply. First, contrary to respondent's contentions the fact that Doubleday received not even the most perfunctory hearing on the sequence of events surrounding its receipt of respondent's vague and conclusory demand letter *after the publication of Touching*[2] is nowhere better established than in the Court of Appeal's decision erroneously concluding that Doubleday had licensed the paperback rights to *Touching after* the initial hardback publication of the novel and *after* Doubleday had received respondent's demand letter.[3] Simply,

[1] *See* respondent's Brief at 1-2.

[2] *See* Doubleday's Petition at 29 *and* respondent's Brief at 14-16.

[3] As we have shown in our Petition, the paperback license was granted to New American Library well in advance of both hardback publication and Doubleday's receipt of Bindrim's demand letter. *See* Doubleday's Petition at 15n.13.

this issue was never raised or contemplated as a basis for liability under the "actual malice" standard, nor could it have been because the basis for respondent's complaint against Doubleday was its publication of the hardback edition of *Touching*. No court has ever determined that the mere license of paperback rights can impose liability in a public figure libel action when there has been a judicial determination that the original publication was not made with constitutional "actual malice." Just as clearly, such an erroneous contention cannot be permitted to stand as "sufficient evidence to permit the conclusion that [Doubleday] *in fact entertained serious doubts as to the truth of* [*its*] *publication*"[4] under the liability standards established in *New York Times Co.* v. *Sullivan*.[5]

Secondly, in purporting to show that Doubleday did not comply with the interim standards[6] governing publisher liability set out by the Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967), respondent has quoted from the testimony below of Mr. Robert Gutwillig for the proposition that "the matter of determining whether a fictional character in a novel is indeed a representation of an actual person '*is not one that can be resolved simply by the expedience of asking the author and stopping there.*' "[7] Respondent conveniently ignores the fact that the foregoing statement to which he calls attention was that *of respondent's counsel* and that Mr. Gutwillig's testimony in response

[4] St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added) (hereinafter *"St. Amant"*).

[5] 376 U.S. 254, 279-80 (1964) (hereinafter *"New York Times"*).

[6] This interim standard was that of "the responsible publisher" and was subsequently abandoned in *St. Amant, supra*, 390 U.S. at 731.

[7] *See* respondent's Brief at 12-13 (respondent's emphasis).

to counsel's hypotheticals presupposed both that an editor was conducting a *pre*-publication review of a manuscript and that the editor had *actual knowledge* that the character represented in the manuscript to be fictional was *in fact* a living individual. (R.T. 574-77.) To contend in such circumstances that no pre-publication investigation is necessary would be ludicrous; but, in attempting to compare that situation with the one Doubleday faced upon receiving respondent's vague letter *after* the publication and distribution of *Touching* and *after* Mrs. Mitchell had warranted and represented for a *third* time that the characters in her novel were completely fictional and that respondent's letter was totally unfounded, respondent has not only misinterpreted Mr. Gutwillig's testimony as well as the *Butts* liability standards for "responsible publishers," but has also accentuated the reasons why the "rule" enunciated below is both unconstitutional and functionally unsound.

The enhanced "duty to investigate" which the California courts would impose upon publishers focuses upon the activities of a publisher *after* publication and dissemination of the work in question. Thus, it was precisely because Doubleday's pre-publication review and examination of its author yielded nothing upon which subjective knowledge of serious doubt as to the truth of its publication could even remotely be based that neither the jury, the trial court nor the California Court of Appeal found that Doubleday had acted with "actual malice" in its publication of *Touching*. Instead, the Court of Appeal, on its own initiative, determined that liability attached because of the events which occurred *after* the publication of *Touching*. In choosing

this time frame as the basis for the imposition of liability, the court discarded the "actual malice" standard as it properly applies to a publisher's subjective awareness of libelous material in the pre-publication period and substituted its own erroneous and unconstitutional strict liability standard which imposed liability for Doubleday's not acceding to the demands contained in a vague lawyer's letter received after publication and the licensing of paperback rights. By changing the vantage point for judicial determinations and thus converting the "actual malice" standard into one of absolute liability, the "rule" below effectively chills free speech and imposes prior restraints upon the publishers of critical fiction who, because they are unable to check every word and thought of authors, would therefore be absolutely precluded from printing such works.[8] Such a shocking disregard for this Court's decisions clearly mandates a review and reversal of the decisions below.

Like the courts below, respondent apparently refuses to accept the *New York Times*,[9] *Gertz*[10] and *St. Amant*[11] holdings that a publisher's failure to investigate cannot establish liability under the "actual malice" standard. Respondent would instead have this Court ratify the decision below and impose upon publishers (as a *constitutional* requirement) an enhanced "duty to investigate" even those un-

[8] *See* Brief of the Association of American Publishers, Inc. as *amicus curiae* (filed November 15, 1979) at 10n.5.

[9] 376 U.S. at 263.

[10] Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974).

[11] 390 U.S. at 733.

substantiated claims made in the post-publication period.[12] The result under the facts of this case would also be the imposition of a duty to police and control the acts of publishers' independent licensees (the identity of which could easily be discovered and who could easily be joined by a plaintiff in any subsequent legal action). Such a "rule," of course, would be a clear intrusion upon the First Amendment freedoms accorded publishers since the *New York Times* case and is, moreover, expressly contrary to this Court's defined standards for establishing a publisher's "actual malice."[13] Accordingly, the decision below cannot be allowed to stand.

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[12] Notably, respondent and the Court of Appeal would apparently impose the requirement to check with the individual claiming to have been libeled (as a part of a publisher's enhanced "duty to investigate" in the post-publication period), despite the fact that that individual had already retained counsel and expressed his intention to bring an action against the publisher. *See* respondent's Brief at 12 (purportedly as to what Doubleday's investigation "would have produced") *and* Exhibit 4 to Doubleday's Petition (demand letter from respondent's counsel: "Additionally, my client intends to seek damages from you, as allowed by law, for your wrongful conduct.").

[13] While respondent has not "deemed" it necessary to discuss or even to address the punitive damage point in our Petition aside from denying the applicability of the *Cantrell* and *Curtis Publishing Co.* decisions (*see* respondent's Brief at 18 and n.8), suffice it to say that the clear absence of any "ill will" or "venting of the spleen" (in addition to an absence of "actual malice") by Doubleday renders the punitive damage award in this case completely illegitimate and unconstitutional. *See also* Brief of the Association of American Publishers, Inc. as *amicus curiae* (filed November 5, 1979) at 12-18.

Conclusion

For the foregoing reasons, as well as for those set forth in Doubleday's Petition, the Writ of Certiorari should be granted and the decisions of the courts below should be reversed.

Respectfully submitted,

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November 19, 1979

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,

Petitioner,

v.

PAUL BINDRIM,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF, AS *AMICUS CURIAE*, WITH BRIEF IN SUPPORT OF DOUBLEDAY & COMPANY, INC.

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November 5, 1979

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby respectfully moves this Court, pursuant to Rule 42, for leave to file the brief *amicus curiae* conditionally filed herewith, in support of the Petition of Doubleday & Company, Inc. ("Doubleday") urging reversal of the judgment below. The consent of Doubleday, by its counsel Satterlee & Stephens, has been obtained and filed concurrently with the Clerk of the Court. The consent of counsel for Respond-

ent was requested but refused; however, Respondent's counsel has been sent copies of the annexed brief *amicus curiae* and has had the opportunity to review same.

The AAP

The AAP is a not-for-profit trade association organized under the laws of the State of New York. It is the major national association of publishers, counting among its more than three hundred members most of the nation's leading commercial book publishers as well as many smaller and non-profit publishers. AAP members publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States, including works of fiction: novels, short stories and dramatic works.

The Interest of the AAP

The purpose of our annexed brief is to address the particular deleterious effects of the decisions below on the book publishing industry. The AAP has also joined with four other organizations in an *amicus* brief, to which counsel for Respondent consented, filed in support of Doubleday in this action and of the author, Gwen Davis Mitchell ("Mrs. Mitchell"), in her separate Petition for a Writ of Certiorari (*see* No. 79-556, filed October 4, 1979).

At isue in this case is a singularly unsound California decision which effectively rewrites the defamation liability standards which have been applicable to publishers since this Court's decision in *New York Times Co.* v. *Sullivan.*

In awarding both compensatory and punitive damages against Doubleday for its publication of the novel *Touching,* the courts below displayed an unjust and uninformed penchant to ignore not only what investigative steps are available to publishers of novels to insure the accuracy of their authors' representations and warranties, but also what liability standards are constitutionally applicable for the innocent publication of defamatory material. Accordingly, the AAP believes that these decisions have impinged on critical First Amendment freedoms and have severely threatened the essential legal climate, presaged by the *New York Times* case, within which publishers may in good faith produce books on issues of public moment without the chilling fear that they will be subject to crushing punitive and compensatory awards for reasonable exercise of First Amendment rights at the unrestrained discretion of judges or juries.

Desirability of the *Amicus Curiae* Brief

The AAP believes that consideration of its brief *amicus curiae* will be of assistance to the Court in its consideration of the pending Petition, and the important constitutional questions presented therein, in the broader context of their practical impact on the editorial standards and practices of the book publishing industry as well as upon the free exercise of book publishers' First Amendment rights.

Conclusion

The AAP respectfully submits that its motion for leave to file its brief *amicus curiae* conditionally filed herewith urging reversal of the judgment below be granted.

Respectfully submitted,

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November 5, 1979

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,
Petitioner,

v.

PAUL BINDRIM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC.

The Interest of the AAP

The interest of the Association of American Publishers, Inc. ("AAP") is set forth in our motion for leave to file, *supra* at 2-3.

Introduction

The AAP most respectfully submits that Doubleday & Company, Inc.'s ("Doubleday") Petition for a Writ of Certiorari to the Supreme Court of California should be granted because the refusal of that court to grant the petition for a hearing filed by Doubleday and the author of the novel *Touching,* Gwen Davis Mitchell ("Mrs. Mitchell"), sanctioned both the creation of a chilling, dangerous and unconstitutional standard of review for publishers in public figure libel actions as well as the unprecedented imposition of punitive damages for the publication of what a publisher reasonably believed to be a work of fiction. Accordingly, the decision below[1] impinged upon publishers' First Amendment freedoms and should be reviewed because:

(i) This case presents a significant opportunity, in the context of a ruling on the singularly important issue of fiction and defamation, to clarify the rule of *New York Times Co.* v. *Sullivan*[2] as it applies to the legal obligations of a commercial book publisher. As the trial court determined, Doubleday's conduct in relying upon the written warranties and subsequent oral representations of an estab-

[1] The last written decision in this case was filed by the California Court of Appeal, Second Appellate District, and followed the trial court's written order denying defendants' motion for judgment notwithstanding the jury's verdict. Thereafter Doubleday and Mrs. Mitchell filed a petition for a hearing before the California Supreme Court, which was denied without opinion on July 12, 1979. References to these decisions will be to the Appendices in Doubleday's Petition for a Writ of Certiorari and will be prefaced with the Appendix letter followed by the page number.

[2] 376 U.S. 254 (1966) (hereinafter referred to as "the *New York Times* case," or simply, "*New York Times*").

lished author in no way violates the "actual malice" standard applicable in public figure cases.[3] Accordingly, the Court of Appeal's fabrication of a "duty to investigate," based upon its own incorrect perception of the facts surrounding the licensing of the paperback rights to the novel, in our view ignores the entire rationale of the "actual malice" standard—that a publisher have such knowledge of actual, verifiable facts that its subsequent publication of a contradictory account must be deemed to have been with "actual knowledge" or "reckless disregard" of the true circumstances, so that it may then be said that it published "calculated falsehoods."

(ii) This case also presents a unique opportunity to clarify this Court's standards regarding the imposition of punitive damages in constitutional defamation actions. Thus, even if "actual malice" had been proven in this case (and it clearly was not), punitive damages should not have been permitted because the First Amendment requires that punitive damages not be awarded absent an express finding of *common law malice* (or "ill will") in addition to "actual malice" as defined by this Court. Such a determination was never made, and indeed, could never be made in this case because Doubleday had no indication even of the respondent's *existence* at the time of its publication of what it reasonably considered to be a completely fictional work.

[3] Respondent Bindrim readily acknowledged at trial that he was a "public figure" for purposes of this action.

The decision below dishonored the principles of *New York Times,* reducing its commitment to "uninhibited, robust" debate to a meaningless incantation protecting nothing of substance or value. Unless the Petition is granted, the rule which will otherwise be established by this case will inevitably lead to the kind of self-censorship which is at odds with a free and vigorous press.

In light of this assault, the AAP considers it essential that the Court re-affirm the promise of *New York Times* and declare as matters of constitutional law that: (i) an additional "duty to investigate" cannot be imposed upon publishers of critical fiction who have otherwise relied in good faith upon the warranties and representations conveyed by established authors as to the fictional nature of their works; and (ii) even if "actual malice" were present in a public figure defamation action, a punitive damage award cannot be constitutionally imposed upon a publisher in addition to compensatory damages without a further determination that the material was published with "ill will" under the traditional standards of common law malice.

ARGUMENT

I. Doubleday did not in fact have serious doubts as to the truth of *Touching* and so cannot be held to have acted with actual malice

It has been clear since the 1964 *New York Times* case that the adequacy of a publisher's pre-publication investigatory procedures is not the determinative factor in deciding whether it has acted with the "actual malice" constitutionally prerequisite to an imposition of compensatory dam-

ages. Thus, in *New York Times,* this Court reversed the Alabama courts' award of damages in a libel action despite the fact that the *Times* had material in its own files that would have shown several of the statements it published in an advertisement to be false.[4] Rather, the Court in *New York Times* focused on the publisher's *subjective* awareness of the facts at the time of publication and so developed the "actual malice" standard under which liability could be imposed in public officials' libel actions only if material was published "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), the Court appeared to have modified the standard for publisher liability in public figure defamation cases when it held:

> [A] "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.* (Emphasis added.)

However, in *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), it became clear that the test of a publisher's liability still hinged on his subjective perception of the facts at the time he published:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be*

[4] *See* 376 U.S. at 263-64.

sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (Emphasis added.)[5]

Emphasizing the fact that it is not what a publisher *might* have done to check up on his author, but what he in fact knew, the Court declared in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 332 (1974): "[M]ere proof of failure

[5] It is clear that even if the more demanding standard from the *Curtis Publishing Co.* decision were applicable, Doubleday still satisfied this "responsible publisher" test. While there are no uniform guidelines that define the standards of the book publishing industry with respect to pre-publication review, reasonable norms for such investigations can be extrapolated. In our view, measured by such norms, the procedures Doubleday followed in this case were well within the standards adhered to by responsible publishers within the industry. Not only did Doubleday's Editor-in-Chief explain to Mrs. Mitchell (an established and well-regarded author) at the outset that none of the characters in *Touching* could be identifiable, but he then obtained a written warranty from her to that effect and, having read the manuscript, received her further assurances that none of the characters in the novel resembled living individuals. Finally, when he received a vague demand letter from Bindrim's attorney *after Touching had been published,* Doubleday's editor again inquired of Mrs. Mitchell whether there was any validity to Bindrim's claims and was told for a *third* time that none of the characters was identifiable. No defamation standard of which we are aware—whether the *New York Times* "actual malice" test or any less demanding standard short of strict liability—required Doubleday, or any publisher, to do more when it was dealing with what it reasonably believed to be a work of fiction.

A book publisher cannot check or confirm the accuracy of every assertion made and it certainly cannot guarantee the validity or integrity of every opinion that appears in its publications. Of course, this proposition is all the more true when the work in question is one of fiction, where the publisher *must* then depend upon the reputation and representations of its author because there are no extrinsic "sources" for it to check. To require more of a publisher by way of an additional duty to investigate would, as a practical matter, turn every publisher into an author or every author into a self-publisher. And it would, as a matter of law, violate the *New York Times* principle that a finding of "actual malice" must be based, not on what a publisher could or should have learned, but only on what the publisher in fact knew or recklessly disregarded.

to investigate, without more, cannot establish reckless disregard for the truth."

In contradistinction to these established precedents, the California decision in this case is grounded in the Court of Appeal's perception of what a publisher "should have" done with regard to investigation.[6] Such second-guessing of publishers' decisions, we submit, can never be countenanced because it invites precisely the kind of strict liability standard which has been definitely rejected by this Court for *any* defamation action, even involving *private* figures, but which was in fact imposed by the courts below in this *public figure* action. Instead of following *St. Amant,* California, because of the misperceptions of the Court of Appeal and the inaction of that state's Supreme Court, has thus adopted a "Monday morning quarterback" standard of liability expressly rejected by this Court even for *private* figure defamation (*see Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 347) and which is notably the *most* restrictive, rather than the constitutionally required *least* restrictive alternative available. *Id.* at 349.

Moreover, the decision below looks not to the publisher's subjective awareness at the time of the publication, but to a subsequent time when the novel was already in distribution. Then, having received a very vague demand letter, Doubleday was found liable (and under a purported *"actual malice"* standard)—even after it had confronted the author with the claims it had received and obtained an unqualified denial of the allegations. Significantly, Doubleday was held liable for not preventing distribution by another publisher, the licensee of *Touching*'s paperback edi-

[6] *See* B 9-10 in Doubleday's Petition for a Writ of Certiorari.

tion—apparently because the court believed Doubleday should have disregarded its author's warranties and assurances and somehow conducted an investigation into the vague and conclusory claims made in the demand letter.[7] Manifestly, even the semblance of a predictable rule of law was lost in this decision.

Despite all the contradictions and misapplications of the constitutional rules applicable to public figure libel cases, the one thread that runs through both the appellate and trial court decisions is that Doubleday did *not* have "actual malice" at the time it published *Touching*.[8] That, we believe should be dispositive of this case and it is that undisputed fact which makes this case an appropriate one to take for consideration and in which to clarify these crucially important constitutional standards.

II. The punitive damage award is constitutionally impermissible because it would be impossible to find that Doubleday published *Touching* with common law malice or ill will

The potential conflict between the First Amendment and the law of defamation has been well recognized by this Court and matched—if not spurred—by a growing percep-

[7] This additional "duty to investigate" imposed by the Court of Appeal, of course, ignores the fact that there are generally no "sources" for a novel of which a publisher would be aware other than what its author had previously disclosed to it. Thus, the "duty to investigate" which the Court of Appeal imposed upon Doubleday is impossible as a practical matter to carry out with regard to what the publisher reasonably believes to be fiction and, additionally, would have the counterproductive effect of creating completely unwarranted antagonisms and distrust between publishers and authors—thereby ultimately stifling creative expression.

[8] *See* B-8 and C-3 in Doubleday's Petition for a Writ of Certiorari.

tion that the traditional concept of punitive damage awards cannot easily be harmonized with our national commitment to the uninhibited exercise of First Amendment freedoms. This Court's recent cases teach that punitive damages in libel actions are disfavored and, at the very least, must be carefully scrutinized because of their potentially chilling effect upon the freedoms of speech and the press recognized in *New York Times*.[9]

The instant case, on the facts outlined above, graphically demonstrates that past qualms over the awarding of punitive damages were not without foundation. Here, after a jury's award of punitive damages had been struck as totally unwarranted by the trial judge, an appellate court, utilizing suspect rationales and misstating the facts of the case, determined that the punitive award should be reinstated not because of any "ill will" by Doubleday toward the respondent, but because the court did not believe that Doubleday had taken every investigative step possibly open to it.[10] Concerns over the "unbridled whim" of the jury in awarding punitive damages pale against this rare but nonetheless disastrous caprice of an appellate court.

Accordingly, we submit that this case presents a most appropriate opportunity for the Court to clarify its rules limiting the availability of punitive damages in constitutional defamation cases and, in so doing, to adopt as a principle of constitutional law the rule that punitive damages

[9] *See also* in another context this Court's recent opinion in International Brotherhood of Electrical Workers v. Foust, 44 U.S.L.W. 4600 (U.S. May 29, 1979), barring the award of punitive damages where other significant interests are at stake.

[10] The facts, of course, prove otherwise. *See* note 5 *supra*.

may not be awarded against a publisher in such actions unless there is the traditional express finding of common law malice or ill will *in addition to* the finding of "actual malice" necessary to support an award of compensatory damages. Experience has proven that any lesser rule undermines this Court's desire to narrow, rather than to expand, the availability of punitive damages in such cases.[11]

From the very outset in the *New York Times* case this Court was at pains to make it clear that a substantial motivation for the development of special rules in constitutional defamation actions was the chilling effect of the imposition of massive damages there permitted by the Alabama courts:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.
>
> * * *
>
> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms canont survive. 376 U.S. at 277-78.

In *Curtis Publishing Co.* v. *Butts, supra,* a punitive damage award was affirmed. But even there the Court was careful to note that punitive damages were traditionally limited at common law by the principle we urge herein:

> The usual rule in libel actions, and other state-created tort actions, is that *a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award.*
>
> * * *

[11] *See* note 14 *infra.*

> Moreover, *punitive damages require a finding of "ill will" under general libel law* and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. 388 U.S. at 160-61 (emphasis added).

Thereafter, these concerns led to open condemnation of punitive damages by Justices Marshall and Stewart who argued on constitutional grounds, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971), for outright elimination of the discretion to impose such exemplary awards:

> The manner in which unlimited discretion may be exercised is plainly unpredictable. And the fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times.*
>
> * * *
>
> The unlimited discretion exercised by juries in awarding punitive . . . damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. 403 U.S. at 83-84 (dissenting opinion).[12]

[12] Even if it be accepted that an award of punitive damages will ordinarily have a deterrent effect on others who might otherwise have engaged in similar "antisocial behavior," this rationale cannot justify the award in this case. Here, Doubleday did act as a "responsible publisher" and there simply is nothing else it could have done to

(footnote continued on next page)

Of course, these developing concerns led to the outright elimination, in *Gertz* v. *Robert Welch, Inc., supra,* of punitive damages in all cases where "the private defamation plaintiff establishes liability under a less demanding standard than that stated by *New York Times*. . . ." 418 U.S. at 350.[13] The *Gertz* majority detected a dangerous conflict between awards of punitive damages and the constitutional considerations that underlie *New York Times*:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. *Id.*

Finally, in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court drew a specific distinction between legally implied "actual malice" and the traditional concept of common law malice:

(footnote continued from preceding page)

further insure that *Touching* was a work of fiction (as the trial court so determined). Accordingly, the punitive damages awarded in this case cannot serve a deterrent or even an instructive function; their only effect will be to hinder and suppress the publication of fictional works involving current trends and ideas. Moreover, an award of punitive damages in such unfounded circumstances as are present herein will necessarily create a further incentive toward litigation, inviting the additional danger that speech will be chilled by the mere prospect of expensive legal action.

[13] We are not here arguing, in urging this Court to grant the Petition, that an absolute bar against punitive damages must be adopted. Thus, we are hopeful that a clarification of the need for employing the traditional common law requisites to an exemplary award will be sufficient to avoid the chilling effect on constitutional rights here at issue. It is possible, however, that experience will ultimately demonstrate that an absolute proscription may indeed be necessary and that the rule in *Gertz* should be expanded to bar punitive damages in *New York Times* and all other defamation cases.

> [O]f course, "actual malice" is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, *it is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages.* *Id.* at 251-52 (emphasis added) (footnote omitted).

In this case no finding was made, nor could have been made on the facts outlined above, of Doubleday's ill will. Accordingly, the punitive award violates the principles and, until now, the only implicit guidelines of this Court in the cases just reviewed. Simply, this is not a "venting of the spleen" type of case and Doubleday's actions can in no way justify the punitive award here imposed.

We submit that this unjust result proves beyond question that the manner in which a jury (or even an appellate court) may exercise its discretion to severely punish a publishing defendant creates a very real danger of the self-censorship and consequent infringement on freedom of the press that the *New York Times* case and its progeny sought to prevent. It seems clear from this case that the lower courts' current perceptions of what findings are sufficient to justify an award of punitive damages in public figure libel actions is inadequate and that the fruits of this misunderstanding can still have a calamitous effect on the publishing industry even after the *New York Times* cases.[14]

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[14] Trial and appellate courts in a number of recent cases, in which highly suspect punitive damage awards were imposed, appear to have been misled by this Court's ruling in *Gertz, supra.* They

(footnote continued on next page)

We believe that, with the unjust result reached below, the time has come for a reaffirmation of the principles enunciated in *New York Times* so that fact-finders (at whatever judicial level) may not simply pay lip-service to an "actual malice" standard and then proceed to ignore the protections afforded publishers and the press under the First Amendment. Thus, particularly where the threat is to the creative processes involved in the development of critical fiction (where a wide latitude is especially important), further instruction would appear necessary as to exactly what findings are constitutionally necessary to support a finding of liability and imposition of punitive damages against publishers. By taking this case, defining the standards of liability required in actions involving fictional works and confirming that punitive damages may not be awarded absent an additional finding of publisher "ill will," this Court would help to solidify the promise of *New York Times*. We strongly urge that these steps be taken.

(footnote continued from preceding page)

appear to have adopted the erroneous view that traditional state common law standards regarding the prerequisites for punitive damages are no longer applicable in constitutional defamation cases. *See, e.g.*, Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977) (allowing punitive damage awards upon a showing of "actual malice"); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (jury's award of $2 compensatory damages and $125,000 punitive damages under the "actual malice" standard reversed on other grounds); Davis v. Schuchat, 166 U.S. App. D.C. 351, 510 F.2d 731 (1975) (trial court's award of $1 compensatory damages and $1,500 punitive damages under "actual malice" standard affirmed). In taking this approach the lower courts, in our view, are clearly misreading *Gertz*. In consequence, these courts have made it *easier* for juries to impose, and courts to uphold, unjustifiable punitive awards which make a mockery of the proper goal of *Gertz* to constrain punitive damages in constitutional defamation cases. On this ground alone, this Court should grant the Petition for a Writ of Certiorari so as to clarify and effectuate its desire to prevent unjust punitive awards where First Amendment values are implicated.

Conclusion

For all of the foregoing reasons, the Petition should be granted.

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November 5, 1979

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